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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901 1902.

No. 269.

THE UNION AND PLANTERS' BANK OF MEMPHIS, TENNESSEE, PLAINTIFF IN ERROR,

vs.

THE CITY OF MEMPHIS AND JOHN H. ALSUP, TRUSTEE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

FILED MARCH 26, 1902.

(18,089.)

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vs.

THE CITY OF MEMPHIS AND JOHN H. ALSUP, TRUSTEE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 26, 1901.

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1 *Transcript of Record.*

Filed Apr. 3, 1899. John B. Clough, Clerk.

In the Circuit Court of the United States for the Western Division of the Western District of Tennessee, at Memphis. In Equity.

THE UNION & PLANTERS' BANK, Plaintiff,
vs.
THE CITY OF MEMPHIS and JOHN H. ALSUP, as Trustee of Shelby County, Tennessee, Defendants. } 532.

To the honorable the judges of the circuit court of the United States for the sixth circuit:

Your orator, The Union & Planters' Bank, brings this its bill of complaint against The City of Memphis, a municipal corporation by the laws of the State of Tennessee, and John H. Alsup, as trustee of the county of Shelby, and thereupon complaining it says:

That it is a banking corporation, having it- situs at Memphis aforesaid, operating under a special charter granted by the State of Tennessee on the 20th day of March, 1858, and amended by an act passed on the 12th day of February, 1869, and from the date of its organization it has paid to the City of Memphis all the taxes which were assessed against it by the City of Memphis, which it was legally required to do.

That it was for years adjudged, by an unbroken line of decisions in Tennessee, as exempt from the payment of ad valorem taxes to the State of Tennessee, to the county of Shelby, and to the City of Memphis, on account of its shares of stock, other than the charter tax annually to the State of Tennessee. That it has been in

2 many litigations, involving the claim on behalf of the City of Memphis, State of Tennessee and county of Shelby, that it was liable to pay to them, and each of them, ad valorem taxes on different subjects of taxation, and in each and every of said suits your orator maintained that under the clause in its charter, which provided that it should pay annually to the State one-half of one per cent. on each share of capital stock subscribed, it should be exempt from the payment of any other or further tax, either to the State of Tennessee, county of Shelby or the City of Memphis, whether ad valorem taxes or license or privilege taxes.

Your orator further showeth to your honors that on the 22nd day of October, 1891, the State of Tennessee, for the use of the City of Memphis, and the City of Memphis exhibited an original bill in the chancery court of Shelby county, Tennessee, that court having jurisdiction of the subject-matter of the said suit against it, and therein the said City of Memphis claimed that for the year 1897, its capital stock was assessed for taxation, both by the regular assessor and by the county trustee of Shelby county, at the sum of $400,000.00. That the municipal tax rate for that year was $2.35 on each $100.00,

and the amount due from your orator on account of said capital stock was the sum of $9,400.00, with interest from the 1st day of May, 1887.

That for the year 1891 the capital stock of your orator was assessed at the sum of $456,000.00, and that the total tax rate on every $100.00 of property for that year, levied by the State for the use of the City of Memphis, was $1.75 on every $100.00 of property, and that your orator was indebted for municipal taxes in the sum of $7,980.00, with interest thereon from the 1st day of May, 1891.

It was further averred in the aforesaid bill of complaint that by section 14 of the revenue laws of the State, passed in 1887, the same being chapter 2 of the acts of that year, it was enacted as follows:

"Be it further enacted, That this act shall not be so construed, and it shall not co-operate as to exonerate or release from taxation, any company or corporation whose charter exempts stock and the shares thereof from taxation, but it is hereby enacted that in all cases where such stock is exempted, such company or corporation shall be assessed in such way as may be lawful; and in all cases in which, by the terms or legal effect of the charter, the shares of stock in any corporation are wholly or partially exempt from taxation, or in which a rate of taxation on the shares of stock is fixed and
3 prescribed and declared to be in lieu of all the taxes for State, county and municipal purposes, shall be assessed and levied at a rate uniform with the rate levied upon other taxable property upon the capital stock of said corporation, the value of which capital stock shall be fixed and returned by the assessor as being equal to the aggregate market value of all the shares of stock in said corporation, including the net surplus."

The bill also averred that notwithstanding a provision of said section, the capital stock of your orator was not assessed for the years 1888, 1889 or 1890. That ascertaining this fact, the county trustee of Shelby county, as he was by law authorized to do, duly assessed its capital stock for the years aforesaid, and the said City of Memphis was entitled to have and recover on account of the assessments aforesaid of your orator, taxes on its capital stock as follows: For the year 1888, $9,400.00; for the year 1889, $9,870; for the year 1890, $11,926.25, with interest thereon from the 1st of May of the year for which the assessments were made.

The bill further averred that your orator claimed an exemption by virtue of its original charter, and the amendments thereof, of its capital stock from taxation, and also that the aforesaid provisions of the act of 1887 had been continued in force by the succeeding acts of the legislature of the State of Tennessee, and that under the aforesaid acts, the capital stock of your orator in its hands was subject to ad valorem taxes to the City of Memphis.

The bill further set forth that the exemption claimed by your orator was in these words: "That said company shall pay to the State of Tennessee an annual tax of one-half of one per cent. on each share of stock subscribed, which shall be in lieu of all other taxes."

The cause thereupon came on to be heard upon a demurrer interposed by your orator, which is in these words:

"In Chancery Court of Shelby Co., Tennessee.

STATE OF TENNESSEE, Use, etc.,
vs.
UNION & PLANTERS' BANK & S. P. READ, Cashier. } 8087, R. D.

Defendants demur to the bill filed against them on 22d of
4 Oct., 1891, as entered above on the rule docket. The ground of this demurrer is that the object sought by this bill is to enforce the payment of taxes by said bank in excess of the sum of an annual tax of one-half of one per cent. on each share of stock subscribed, which is the tax by the terms of the charter contract between said bank and the State of Tenn., which shall be in lieu of all other taxes. Defendant says said bank is not liable for nor bound to pay the taxes demanded and sought to be so collected, and that defendant Read, sued as the cashier, cannot be required to answer said bill nor make the discovery sought from him in and of the effort to collect such taxes.

(Signed) CRAFT & CRAFT,
Solicitors for the Defendant."

Before the Hon. J. S. Galloway, sitting by interchange with the chancellor, who finally adjudged and decreed the demurrer to be well taken upon all the points therein set out.

Said City of Memphis appealed from the aforesaid decree and judgment to the next term of the supreme court of Tennessee for the western district of Tennessee, and filed a transcript of the record in said court, and the case was heard by the said supreme court upon the said appeal, when the court, after full consideration, finally adjudged and decreed on the 7th of June, 1892, that there was no error in the decree of the court below, and expressly adjudged all the points covered by and embraced in the opinion filed by the judge who delivered the opinion. All of which will more fully appear from a certified copy of the record, which is herewith filed and made part of this bill, marked Exhibit A, but which need not be copied.

And your orator further shows to the court that in the opinion of the learned judge he expressly held, considering the decisions of the supreme court of Tennessee, and the decisions of the Supreme Court of the United States, and giving them the controlling weight to which they were entitled, that the charter tax of one-half of one per cent. is in lieu of all other taxes, whether against the bank or its capital stock, or against owners on account of their shares of stock.

Your orator further showeth to your honors that the aforesaid judgment in its favor was based upon the identical claim of exemption now asserted by it in order to defeat the taxes now in question,
and to cancel the assessment against it hereinafter to be set
5 forth, and the judgment and decree aforesaid adjudged its claim to exemption upon the identical same facts and conditions as those hereinafter presented, and your orator is advised and insists that the question of its exemption from the payment of ad

valorem taxes to the City of Memphis on account of its capital stock, has been finally judicial- determined not to exist, because of the judicial construction put upon its exemption in the suit to determine that question between it and the said City of Memphis.

And further complaining, showeth your orator unto your honors, that by chapter 120 of the Acts of 1895, and section — thereof, it was provided that no taxes should thereafter be assessed upon the capital stock of any bank or banking association, but that the shares of stock should be assessed to the individual shareholder, and that under the aforesaid law it was adjudged by the supreme court of the State of Tennessee that its capital stock was not subject to taxation.

Your orator further showeth to your honors that by section 16 of chapter 1 of the Acts of 1887, the General Assembly of the State of Tennessee passed an act which provided as follows:

"Be it further enacted, That this act shall not be so construed, and shall not so operate, as to exonerate and release from taxation any company or corporation whose charter exempts stock and shares thereof from taxation: but it is hereby enacted that in all cases where such stock is ex- (sic)

Your orator further showeth to your honors that the aforesaid judgment in its favor was based upon the identical claim of exemption now asserted by it in order to defeat the taxes now in question, and to cancel the assessment against it hereinafter to be set forth, and the judgment and decree aforesaid adjudged its claim to exemption upon the identical facts and conditions as those herein presented. And your orator is advised and insists that this question of its exemption from the payment of ad valorem taxes to the City of Memphis on account of its capital stock, has been thus finally judicially determined in its favor to exist, by a judicial construction of its exemption in the aforesaid suit to determine that very question between it and the said City of Memphis.

And further complaining showeth your orator unto your honors that by chapter 120 of the Acts of 1895 and section 10 thereof, it was provided "that no tax shall hereafter be assessed upon the capital of any bank or banking institution * * * but
6 the shareholders in such bank or other association shall be assessed and taxed upon the market value of their shares of stock therein."

Under the section above, it was also adjudged by the supreme court of the State of Tennessee, that its capital stock was not subject to taxation, and in a suit between said City of Memphis and your orator.

Your orator further avers that subsequently it was enacted as follows: "Be it further enacted, That this act shall not be so construed, and shall not so operate, as to exonerate and release from taxation any company or corporation whose charter exempts stock and shares thereof from taxation; but it is hereby enacted that in all cases where such stock is exempted, such company or corporation shall be assessed in such way as may be lawful; and in all cases in which, by the terms or legal effect of the charter, the shares of stock in any corporation are wholly or partially exempt from taxation, or in which a rate of taxation on the shares of the stock is fixed and pre-

scribed, and declared to be in lieu of all other taxes for State, county and municipal purposes, shall be assessed and levied at a rate uniform with the rate levied upon other taxable property, upon the capital stock of said corporation, the value of which capital stock shall be fixed and returned by the assessor as being equal to the aggregate market value of all the shares of stock in said corporation, including the new surplus; provided, however, that where the State has provided, in the charter of any such corporation or company, that it shall pay a stated per cent. on each share of stock subscribed, annually, to the State, which shall be in lieu of all other taxes, it shall be entitled annually to a credit therefor upon its assessment of its capital stock, as hereinbefore provided." Section 16 of chap. 1, Acts 1897.

That afterwards, the value of its capital stock was assessed under the aforesaid section at $132,000.00, and the City of Memphis claims that it is liable to it for ad valorem taxes on said assessment for the year 1899, in a sum exceeding $2,000.00, exclusive of interest and costs.

Your orator avers that it is contractually exempt from the payment of any ad valorem taxes to the City of Memphis, resulting from the aforesaid provision in its charter, and it also avers that the fact of such exemption was conclusively determined by the presumption of the thing adjudged, resulting from the judgment and decree previously rendered between it and the said City of Memphis and yet, notwithstanding its aforesaid contractual exemption,
7 and such conclusive determination of such exemption by the presumption of the thing adjudged between it and said City of Memphis, the said City of Memphis is now attempting to enforce the aforesaid assessment and collect a tax based thereon, to the impairment of the obligation of the contract between your orator and the State of Tennessee, which it is advised and avers is protected by the contract clause of the Constitution of the United States.

And your orator further avers that the said John H. Alsup is county trustee of the county of Shelby, in the State of Tennessee, and by virtue of his office, the duty is imposed upon him to collect ad valorem taxes due to the city of Memphis.

Wherefore, in consideration of the premises, your orator prays that The City of Memphis and John H. Alsup, county trustee and *ex officio* collector of municipal taxes for the city of Memphis, be cited to appear and answer the allegations of this bill, conformably to the practice of this court; and that on final hearing your orator have a decree canceling the aforesaid assessment and establishing, as between it and the said City of Memphis, that it is contractually exempt from the payment to the said City of Memphis of ad valorem taxes on its capital stock; and all such other and further relief as may be suitable and proper in the premises, and that a restraining order issue *pendente lite* prohibiting the said John H. Alsup from any attempt to collect or enforce the said assessment until the final decision of this cause.

CANALL & McKELLAR AND
COOPER & WADDELL,
Sol's for Complainant.

EXHIBIT "A."

STATE OF TENNESSEE,
Shelby County.

Be it remembered that at a term of the chancery court of Shelby county, State aforesaid, began and held at the court-house, in the city of Memphis, in and for said county, on Monday, the 5th day of October, 1891, the same being the first Monday in October, 1891—present and presiding, the Hon. J. S. Galloway, probate judge, sitting by interchange with Hon. W. D. Beard, chan-
8 cellor, being incompetent—the following proceedings were had, to wit:

Original Bill No. 8087, *R. D.*

Filed 22d day of Oct., 1891.

THE STATE OF TENNESSEE, for the Use of THE CITY OF MEMPHIS, and The City of Memphis
vs.
THE UNION & PLANTERS' BANK and S. P. READ.

To the Hon. W. D. Beard, chancellor of the chancery court of Shelby county, Tennessee:

Complainants would respectfully state and show to the court as follows, to wit:

I. The above-named defendant, The Union & Planters' Bank, is a banking corporation organized under the laws of the State of Tenn., and having its situs and place of business in the city of Memphis, Shelby county, Tenn. By an act of the legislature of said State, passed on the 20th day of March, 1858, the Desoto Insurance & Trust Company was incorporated with all the powers, privileges and immunities and subject to all the pains, penalties and forfeitures of the act establishing the Bluff City Insurance Company of Memphis. Said act of incorporation will be found in the 12th section of chapter 166 of the Acts of 1857–'8.

The said act incorporating the Bluff City Insurance Company of Memphis will be found in the same chapter, to wit, 166, of the Acts of 1857–'8, and sections one to ten thereof, inclusive. By the tenth section of said act incorporating the Bluff City Insurance Company it was enacted, "that said company shall pay to the State of Tenn. an annual tax of one-half of one per cent. on each share of stock subscribed, which shall be in lieu of all other taxes."

Said Desoto Insurance & Trust Company was empowered to do a general fire and life insurance business, with a capital stock of not less than $300,000. By the subsequent act of the legislature, passed Feb'y 12th, 1869, said corporation was authorized to abandon
9 the business of insurance and adopt that of banking, under the name and style of the Union & Planters' Bank of Mem-

phis, with the privilege of increasing their capital stock to a sum not exceeding $1,000,000, and retaining "all their present rights, privileges, and immunities, excepting that of insurance." Shortly after the date of said amending act the privilege aforesaid was accepted by the stockholders of the corporation, the name changed to that of the Union & Planters' Bank of Memphis, the business of insurance abandoned and that of banking adopted, and from that time forth to the present day the said corporation has been engaged in the banking business in the city of Memphis, its banking house and business being located and carried on in the 4th ward of the city, the capital, under the privilege granted by said amending act, being increased to and has been since that time maintained at $600,000, the same being divided into shares of $100 each.

For the year 1887 the capital stock of the defendant company was duly assessed both by the regular assessing officer and by the county trustee at the sum of $400,000.00; the municipal tax rate for that year $2.35, and the amount due from the defendant bank upon the theory that the shares of stock therein are exempt from taxation in the sum of $9,400.00, with interest from May 1st, 1887. For the year 1891 the capital stock of said Union & Planters' bank in Memphis was assessed at the sum of $456,000. The State of Tennessee for that year levied a total tax rate of $1.75 on every $100.00 of property in the city of Memphis, for the use of said city, and the said defendant corporation is therefore indebted to the State for the use of said city or to said city directly in the sum of $7,980, the unpaid tax on the capital stock aforesaid for said year 1891, and the sum last aforesaid bears interest at the rate of six per cent. per annum from the 1st day of May, 1891.

III. By section 14 of the general revenue laws of the State, passed in 1887, the same being chapter 2 of the acts of that year, it was enacted as follows, to wit: "Be it further enacted, that this act shall not be so construed, and shall not so operate, as to exonerate or release from taxation any company or corporation whose charter exempts stock and shares thereof from taxation; but it is hereby enacted that in all cases where such stock is exempted such company or corporation shall be assessed in such way as may be lawful; and in all cases in which by the terms or legal effect of the charter, the shares of the stock in any corporation are wholly or partially exempt from taxation, or in which a rate of taxation on the shares of stock is fixed and prescribed and declared to be in lieu of all the taxes for State, county and municipal purposes, shall be assessed and levied at a rate uniform with the rate levied upon other taxable property upon the capital stock of said corporation, the value of which capital stock shall be fixed and returned by the assessor as being equal to the aggregate market value of all the shares of stock in said corporation, including the net surplus."

"But, notwithstanding the provisions of said section, the capital stock of said corporation was not assessed for the years 1888, 1889, or 1890. Ascertaining this fact, the county trustee of Shelby county, as he was by law authorized to do, has duly assessed paid capital stock for the year aforesaid as follows, to wit:

For the year 1888	$400,000
For the year 1889	404,000
For the year 1890	675,000

For the year 1888 the city ad valorem was $2.35 on the $100.00. For the year 1889 the ad valorem taxation in and — the said city was $2.35 on the $100.

For the year 1890 the ad valorem taxation in and for said city levied by the State was $2.35 on the $100.00, so that said defendant corporation for the years aforesaid is indebted to complainant City of Memphis, or to the State for its use in the sums following, to wit:

For the year 1888	$9,400 00
For the year 1889	9,870 00
For the year 1890	11,926 25

Each of the several amounts aforesaid bears interest from the first day of May of the year for which the tax was levied.

IV. The defendant corporation claims that by virtue of its original charter and amendments thereto its capital stock is exempt from taxation.

Said capital stock is assessable and taxable under sec. 14 aforesaid of chapter 2 of the Acts of 1887, the said section having been continuously in force since said enactment to the present time.

For the year 1872 the State, county of Shelby, and city of Memphis, under the legislation of the State then in force under-
11 took to assess and tax as other property was assessed and taxed for that year the shares of the stock in the hands of the stockholders of said company. This effort to tax said shares of stock was resisted by said shareholders; litigation ensued in the second chancery court of Shelby county, Tenn. The controversy in that court was determined in favor of the shareholders and against the power of the State, county and city to tax the shares of stock, and appeal therefrom was taken to the supreme court of the State, in which the decree of said chancery court was reversed and a decree rendered in favor of the power of the State to tax said shares, from which last decree a writ of error was sued out from the Supreme Court of the United States, and under a hearing in that court the decree of the supreme court of Tenn. was reversed, the case remanded to that court with directions to enter a decree affirming the decree of the second chancery court of Shelby county negativing the power to tax said shares of stock in the hands of the stockholders. Complainants are advised that the capital stock in the hands of the corporation and the shares of stock in the hands of the stockholders are separate and distinct subjects of taxation; that in the absence of any exemption clause it was without the power of the State, without subjecting such legislation to the objection of double taxation, to have taxed both the capital stock of the corporation and the shares of stock in the hands of the stockholders; that the charter tax or bonus, or whatever else it may be called, of one-half of one per cent to be paid to the State is a tax upon the shares of stock, and that the language, "in lieu of all other taxes," means in lieu of all other

taxes on the shares of stock. It has no effect, as complainant is advised and charges, to exempt the capital stock of the corporation from taxation.

V. Complainants are advised that under the provisions of the act of 1887 aforesaid, which act, so far as is material to the questions here involved, has been continuously in force, the capital stock of said corporation or the shares of stock in the hands of the stockholders is or are taxable. They are further advised that the immunity and exemption embraced or claimed to be embraced in the charter of said defendant corporation cannot operate to exempt both the shares of stock and the capital stock in the hands of the corporation from taxation. Being advised and believing that both the corporation and the capital stock and the shares of stock could not successfully claim exemption from taxation, the assessing officers of the State have from year to year since and including the
12 year 1887 demanded of the proper officers of said corporation a list of the names of the persons owning the shares of stock therein on the 10th day of January of each year, but the said corporation, by its officers, claiming that the shares of stock were not subject to taxation, have refused to furnish the names of the shareholders in said corporation when demanded as aforesaid. The said officers accordingly for the years 1889 and 1890 assessed the shares of stock in the following form, to wit:

"Bank, Union & Planters'.

"Unknown shares and stock, 6,000 shares, $404,000," and the assessment for the year 1890 was made upon "the unknown owners of 6,000 shares of stock of Union & Planters' bank—valuation $675,000."

Complainants are not informed who are the owners of said shares of stock. They are informed that it is claimed in their behalf by the officers of the bank representing them that the said shares of stock are not taxable, and, even if taxable, the assessment is void for indefiniteness and uncertainty.

To the end that complainants may fairly and properly test the question as to whether, by legal effect of the charter of the defendant corporation, both the shares of stock in the hands of the stockholders and the capital stock in the hands of the bank are exempt from taxation. S. P. Read, cashier of said bank and the custodian of its books now and for many years heretofore, including the year 1887, is made a defendant hereto, and is required in his answer to state, under oath, from the books of said defendant corporation, the names of all persons, firms, or corporations owning shares of stock in said bank on the 10th day of January of each and every year, and the amount held by each since and including the year 1887. It is the purpose of the complainant, when the name- of such shareholders shall be furnished in the manner aforesaid, to have said shares of stock assessed for each of the years aforesaid and to bring the shareholders before the court in this proceeding by such amended and supplemental pleadings as may be necessary. Complainants do not claim that both the shares of stock in the hands of the shareholders

and the capital stock in the hands of the corporation was undertaken to be taxed by the legislature of the State, but they do claim that for and since the year 1887 the revenue laws of the State provided generally that the corporate property in the hands of the corporation should not be taxed, and that the shares of stock in such
13 corporation should be assessed to and taxed to the shareholders at their market value.

It was further provided by said act of 1887 and by the succeeding biennial session of the legislature of the State, as already appears by the quotation hereinbefore made of section 14 of the act of 1887, that the capital stock in the hands of the corporation should be taxed if by charter provisions the shares of stock were not subject to taxation. Wherefore complainant desires that both the corporation and the shareholders may be brought before the court in one proceeding, and that it may then be determined whether the tax is validly levied on the shares of stock in the hands of the stockholders or on the capital stock in the hands of the corporation. Complainants do not concede, but, on the contrary, deny, that the aforesaid assessment of the shares of stock for the years 1889 and 1890 are void and invalid, and when the names of the stockholders have been brought before the court the amount of tax due from each of them under said assessment will be shown and judgment prayed for against them.

VI. Complainants have been informed that since the adoption by the State of Tenn. of the constitution of 1870 the defendant banking company has increased its capital stock. It is advised in that event the new stock is taxable. It asks that the defendant, S. P. Read, may, on his oath, state in his answer whether or not the capital stock of the defendant banking company has been increased, and, if so, to what extent, since the adoption of the constitution of the State of 1870, to wit: since the 4th day of May, 1870, and that he may further on oath state the date or dates of such increase of stock, if it has been increased more than once since the date last aforesaid, and that from the books of said company he may furnish a list of the persons, firms, or corporations owning shares of stock on the 10th day of January of each year since and including the year 1887, that has been issued since the adoption of the constitution of the State, on the 4th day of May, 1870. This discovery on oath is asked to the end that the said shares of stock may be assessed so far as the same has not already been legally done, and that the owners thereof may — appropriate amends and supplemental pleadings be brought before the court in this cause for the purpose of enforcing and collecting the tax dues therefrom.

VII. By an act of the legislature passed March 19, 1889, and approved March 23, 1889, the same being chapter 104 of the
14 Acts of 1889, a privilege tax on banking within and for the city of Memphis (then the taxing district of Shelby county) was levied in terms following, to wit: "On the privilege of banking, $1 on every $1,000 of paid-in capital stock, but in no case less than $50 annually."

Complainants state that the amount of capital of the defendant

banking company since and during the year 1889 has been $600,000, and that under the enactment aforesaid the said defendant banking company is indebted to the State of Tenn., for the use of the City of Memphis, or to the City of Memphis directly in the sum of $600 annually, payable at the dates of the passage of the act last aforesaid for the year 1889, and on the first day of Jan'y for the years 1890 and 1891.

Premises considered, complainants pray that the parties named as such in the caption be made defendants hereto; that copy and subpœna issue, returnable to the next December rule day of the court; that the defendant corporation answer under its corporate seal; that the other defendants answer under oath the specific matters as asked in the body of the bill; that the court may determine whether the corporation or the shareholders therein have any immunity from taxation under the charter of said company; that complainants may have a decree against the defendant corporation for such taxes, with proper interest, as may be legally due from it, and may have such further and general relief as in equity they ought to have upon the facts stated.

F. T. EDMONSON,
METCALF & WALKER,
Sol's for Complainants.

Cost Bond.

We, the City of Memphis, as principal, and —— ——, as surety, acknowledge ourselves indebted to Union & Planters' Bank & *al.* in the sum of two hundred and fifty dollars; to be void if the said City of Memphis, complainant in a bill which has this day been filed in the chancery court of Shelby county against the said Union & Planters' Bank & *al.*, shall pay all such costs as may be awarded against it by the court in its decrees and orders in said cause.

This 22d day of October, A. D. 1891.

S. P. WALKER.
F. T. EDMONDSON.
C. W. METCALF.

15 *Demurrer of Defendants.*

Filed Nov. 6, 1891.

In Chancery Court of Shelby County, Tennessee.

STATE OF TENNESSEE, Use, &c.,
vs.
UNION & PLANTERS' BANK & S. P. READ, Cashier. } 8087, R. D.

Defendants demur to the bill filed against them on 22d Oct., 1891, as entered above on the rule docket. The ground of this demurrer is that the object sought by this bill is to enforce the payment of taxes by said bank in excess of the sum of an annual tax of one-half of one per cent. on each share of stock subscribed, which is the tax

by the terms of the charter contract between said bank and the State of Tenn., which shall be in lieu of all other taxes. Defendant says said bank is not liable for nor bound to pay the taxes demanded and sought to be collected, and that defendant Read, sued as the cashier, cannot be required to answer said bill nor make the discovery sought from bill in and of the effort to collect such taxes.

CRAFT & CRAFT,
Sol's for Defendant-.

Final Decree.

Entered M'ch 28th, 1892.

STATE OF TENNESSEE, &C.,
vs.
UNION & PLANTERS' BANK ET AL.

This cause came on to be heard upon bill of complaint and demurrer of defendant-, before his honor J. S. Galloway, judge of probate court of Shelby county, sitting in this court by interchange with Hon. W. D. Beard, who, having been of counsel in said case, was therefore incompetent to hear the same. Upon argument had by counsel the court orders, adjudges, and decrees that said demurrer is well taken upon all points therein set out, and the same is sustained and the bill of complaint dismissed with costs, for
16 which execution may issue against it and S. P. Walker, C. W. Metcalf and F. T. Edmondson, sureties on cost bond, from which the complainant prays an appeal to next term of supreme court to be held at Jackson, Tenn., on 1st Monday in April next, which appeal is granted upon complainants giving bond security for cost as the law directs.

Appeal Bond.

We, the State of Tenn., for use of City of Memphis, and surety, J. J. Williams, acknowledge ourselves indebted to the Union & Planters' Bank *et al.* in the sum of two hundred and fifty dollars; to be void of the said State of Tenn., for use, &c., who has prayed for and obtained an appeal from the decree of the chancery court of Shelby county, in a cause in which The State of Tenn., for use of City of Memphis, is complainant and The Union & Planters' Bank *et al.*, defendants, to the next term of the supreme court of Tenn., for the district of west Tenn., to be held at Jackson, Madison county, on the first Monday of April next, shall pay all such costs as shall be awarded it by said supreme court.

This 1st day of April, 1892.

STATE OF TENN., [SEAL.]
By METCALF & WALKER, *Att'ys.*
J. J. WILLIAMS. [SEAL.]

STATE OF TENN., }
Shelby Co. }

I, E. B. McHenry, clerk and master of the chancery court of Shelby county, do hereby certify that the foregoing 24 pages contain a full, true, and perfect transcript of all the proceedings had in a certain cause wherein The State of Tenn., for use, &c., — complainant, and Union & Planters' Bank *et al.*, defendant-, as the same appears of record and on file in my office.

In testimony whereof I have hereunto set my hand and fixed the seal of said court, at office, in Memphis, this the 31st day of March, A. D. 1892.

[SEAL.] E. B. McHENRY, *C. & M.*,
By T. B. CALDWELL, *D. C. & M.*

THE STATE OF TENNESSEE:

I, John W. Buford, clerk of the supreme court of said State for the western division thereof, at Jackson, do hereby certify that the foregoing is a true, perfect, and complete copy of the transcript
17 pronounced by said court at its April term, 1892, in the case of State of Tenn., use, &c., against Union & Planters' Bank *et al.*, as appears of record now on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the court, at office, in the city of Jackson, on this the 24th day of March, A. D. 1893, and of the Independence of the United States the 117th year.

[L. S.] JOHN W. BUFORD, *Clerk*,
By W. H. TIDWELL, *D. C.*

THE STATE OF TENNESSEE:

Pleas before the supreme court of said State for the western division thereof, at the April term, A. D. 1892.

Present: The Hon. W. C. Caldwell, acting chief justice, and D. L. Snodgrass, H. H. Lurton, L. Lehman, and B. J. Lea, associate judges, when the following proceedings were had, to wit:

JUNE 7TH, 1892.

STATE OF TENNESSEE, Use, &c., }
vs. } No. 50. Shelby C. D.
UNION & PLANTERS' BANK. }

This cause was heard upon the transcript of the record from the chancery court of Shelby county, and it appearing to the court that in the decree below is no error, it is therefore considered by the court that the decree be affirmed, complainant's bill dismissed, and the City of Memphis and S. P. Walker and C. W. Metcalf and F. T. Edmondson, sureties on cost bond, pay the costs of the court below, and they and J. J. Williams, surety on appeal bond, pay the cost of the appeal, for which let execution issue. The court adjudicates none of the points raised by the demurrer of the defendants

except those covered by and embraced in the opinion filed, being of opinion that such other points are immaterial after the ruling made in said opinion.

THE STATE OF TENNESSEE:

I, John W. Buford, clerk of the supreme court of said State for the western division thereof, at Jackson, do hereby certify that
18 the foregoing is a true, perfect and complete copy of the decree pronounced by said court at its April term, 1892, in the case of State of Tenn., use, &c., against Union & Planters' Bank *et al.*, as appears of record now on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the court, at office, in the city of Jackson, on this 24th day of March, A. D. 1893, and of the Independence of the United States the 117 year.

JNO. W. BUFORD, *Clerk*,
By W. H. TIDWELL, *D. C.*

Filed April 3, 1899.

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof, begun and held for its November term, A. D. 1898, at the United States court-house in the city of Memphis, in said district, on, to wit: the 3d day of April, A. D. 1899, in the following cause, to wit:

UNION & PLANTERS' BANK, Plaintiff,
vs.
THE CITY OF MEMPHIS ET AL., Defendants. } No. 532.

This day comes complainant, by its solicitors, and files in this court here its bill in this cause and gives the usual bond for costs, and it is ordered that the usual summons issue to next rules.

No. 532. Circuit court of the United States, western district of Tennessee. Union & Planters' Bank *vs.* City of Memphis *et al.* Order of court. Entered and filed 3 day of April, A. D. 1899. John B. Clough, clerk.

The President of the United States of America to the marshal of the western district of Tennessee, Greeting:

You are hereby commanded to summons The City of Memphis, a municipal corporation by the laws of the State
19 of Tennessee, and John H. Alsup, trustee of the county of Shelby, in the State of Tennessee, citizens of the State of Tennessee, if to be found within your district, to appear before the circuit court of the United States in the sixth circuit for the western

district of Tennessee, at Memphis, in said district, on the first Monday in May next, and then and there to plead, answer or demur to the bill filed in the office of the clerk of said court on the third day of April, A. D. 1899, against said defendants by The Union & Planters' Bank, a banking corporation having its situs at Memphis aforesaid, operating under a special charter granted by the State of Tennessee, and who is a citizen of the State of Tennessee. Herein fail not, and have you then and there this writ.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court at Memphis, this third day of April, A. D. 1899, and the 123d year of American Independence.

[L. S.] JOHN B. CLOUGH, *Clerk.*

Memorandum.

The said defendants are required to enter appearance in this suit in the office of the clerk of the circuit court at Memphis, Tennessee, on or before the day on which the subpœna is returnable, or the allegations of the bill herein will be taken for confessed against said defendant and judgment rendered accordingly.

JOHN B. CLOUGH, *Clerk.*

Marshal's Return.

This writ came to hand on the date of its issuance, and I duly executed the same, as herein commanded, by making the contents thereof known to the within-named defendant, J. J. Williams, mayor of the city of Memphis, at Memphis, Tennessee, on the 7th day of April, A. D. 1899, and at the same time and place delivering to him a duly certified copy thereof together with such copy of the bill in this cause; and I further executed this writ by making known the contents thereof to the defendant, John H. Alsup, at Memphis, Tennessee, on the 7th day of April, A. D. 1899, and also then and there delivering to him like copy of the same, and of said bill; and I further executed this writ by making known the contents thereof to the defendant, —— ——, at ——, Tennessee, on the — day of —— A. D. 189–, and also then and there delivering to him like copy of the same, and of the said bill.

Memphis, Tennessee, —— — A. D. 189–.

T. H. BAKER,
U. S. Marshal,
By R. H. McNEELY, *Deputy.*

20 No. 532. Circuit court of the United States, western district of Tennessee. Union & Planters' Bank *vs.* City of Memphis, John H. Alsup, trustee. Summons. Issued 3 day of April, 1899. J. B. Clough, clerk. Returnable April A. D. 1899. Carroll & McKellar, Cooper & Waddell, attorneys.

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof, begun and held for its November term, A. D. 1898, at the United States court-house in the city of Memphis, in said district, on to wit, the 18 day of May, 1899, in the following cause, to wit:

UNION & PLANTERS' BANK, Plaintiff,
vs.
CITY OF MEMPHIS ET AL., Defendant. } No. 532.

For satisfactory reasons to the court appearing it is hereby ordered by the court that the above cause in equity and all motions pending therein, be and the same are hereby continued to the next term of this court.

No. 532. Circuit court of the United States, western district of Tennessee. Union & Planters' Bank *vs.* City of Memphis *et al.* Order of court. Entered and filed 18 day of May, A. D. 1899. John B. Clough, clerk.

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof, begun and held for its May term, A. D. 1899, at the United States
21 court-house in the city of Memphis, in said district, on to wit, the 10 day of July, A. D. 1899, in the following cause, to wit:

UNION & PLANTERS' BANK, Plaintiff,
vs.
CITY OF MEMPHIS ET AL., Defendant. } No. 532.

This cause coming on this day to be heard before the Hon. E. S. Hammond, judge, upon motion of defendant to dismiss the bill of complaint herein, for want of jurisdiction, which motion having been argued by counsel and considered by the court, it is ordered, adjudged and decreed by the court that said motion be overruled and defendants given five days in which further to plead.

No. 532. Circuit court of the United States, western district of Tennessee. Union & Planters' Bank *vs.* City of Memphis, *et al.* Order of court. Entered and filed 10 day of July, A. D. 1899. John B. Clough, clerk.

Circuit Court of the United States, Western District of Tennessee.

UNION & PLANTERS' BANK
vs.
CITY OF MEMPHIS and JOHN H. ALSUP, Trustee. } No. 532.

Demurrer. Filed Aug. 7, 1899.

Joint and several demurrer of the City of Memphis and John H. Alsup, trustee.

The City of Memphis and John H. Alsup, trustee of Shelby county, jointly and severally demur to the bill of complaint filed against them herein, and for grounds of their demurrer they say:

First. There is no diversity of citizenship and no Federal question involved herein, and this court is without jurisdiction.

Second. The complainant has an adequate remedy at law; hence this court has no jurisdiction.

Third. The complainant, if it is entitled to any redress at all has a plain and adequate remedy by paying under protest the tax demanded, and suing to recover back.

22 Fourth. The former adjudication set up in the bill must be limited to the taxes actually in litigation and the judgment relied on is not conclusive in respect of taxes assessed for other and subsequent years.

Fifth. Since the adjudication relied upon as a bar, the Supreme Court of the United States and the supreme court of Tennessee have expressly held and it is now the law that the complainant is not entitled to any exemption from taxation upon its capital stock, that the charter tax and charter exemption were upon and of the shares of stock and not the capital stock, and hence the right of the city to tax the complainant's capital stock is no longer an open Federal question, nor an open question of any sort.

Sixth. So much of the bill as relies upon a former adjudication of the question involved by the courts of Tennessee raises no Federal question, and as to this part of the bill the Federal court has no jurisdiction.

Seventh. By the injection into the bill of a Federal question, repeatedly decided in the courts of last resort against the bank's contention, the bill does not confer upon the Federal court jurisdiction of the purely local question of *res adjudicata*.

Eighth. The Federal court may assume jurisdiction so far as the bill relies upon an impairment of the obligation of a contract as an original question, but the Federal court should decline to exercise jurisdiction of the question of the weight and effect to be given to a former judgment of the State court.

Ninth. The capital stock of the complainant is by law subject to taxation by the City of Memphis.

Tenth. In the suit in which the judgment is relied on as a bar the parties were not the same, the statutes under consideration were

not the same, the questions of law and fact were not the same, and the subject-matter was not the same, as appear from the bill to be involved herein.

Eleventh. There is no equity on the face of the bill.

Wherefore the defendants pray that the bill be dismissed and that they go hence with their costs in this behalf; and will ever pray, &c.

JOHN H. WATKINS,
Solicitor for Defendants.

SHELBY COUNTY, }
Tennessee. }

John H. Alsup, makes solemn oath and says that he is one of the above-named defendants and that the foregoing demurrer is not interposed for delay and that the same is true in point of fact.

JNO. H. ALSUP.

23 Subscribed and sworn to before me this 7th day of August, 1899.

[SEAL.] JAMES BRETT, JR.,
Notary Public.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

JNO. H. WATKINS,
Counsel for Defendants.

UNITED STATES OF AMERICA, }
Western Division of the Western District of Tennessee. }

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof, begun and held for its May term, A. D. 1899, at the United States court-house in the city of Memphis, in said district, on to wit, the 25 day of November, A. D. 1899, in the following cause, to wit:

UNION & PLANTERS' BANK, Plaintiff, }
vs. } No. 532.
CITY OF MEMPHIS ET AL., Defendant. }

For satisfactory reasons to the court appearing it is hereby ordered by the court that the above-entitled cause be and it is hereby continued to the next term of this court.

No. 532. Circuit court of the United States, western district of Tennessee. U. & P. Bank *vs.* City of Memphis. Order of court. Entered and filed 25 day of Nov., A. D. 1899. John B. Clough, clerk.

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof,
24 begun and held for its November term, A. D. 1899, at the United States court-house in the city of Memphis, in said district, on to wit, the 24 day of May, A. D. 1900, in the following cause, to wit:

THE UNION & PLANTERS' BANK, Plaintiff,
vs.
THE CITY OF MEMPHIS ET AL., Defendant. } No. 532.

For satisfactory reasons to the court appearing it is hereby ordered by the court that the above cause be and it is hereby continued to the next May term of this court.

No. 532. Circuit court of the United States, western district of Tennessee. Union & Planters' Bank *vs.* City of Memphis. Order of court. Entered and filed 24 day of May, A. D., 1900. John B. Clough, clerk.

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof, begun and held for its May term, A. D. 1900, at the United States court-house in the city of Memphis, in said district, on to wit, the 5 day of November, A. D. 1900, in the following cause, to wit:

THE UNION & PLANTERS' BANK, Plaintiff,
vs.
THE CITY OF MEMPHIS ET AL., Defendant. } No. 532.

This cause came on to be heard upon the application of the complainant to file a supplement to its original bill herein, and the court being advised in the premises, is pleased to order, adjudge
25 and decree that leave be granted, and accordingly the said bill is amended by adding before its prayer in the words and figures following:

"And now by way of supplement and amendment to the bill herein, by leave of the court first had and obtained, your orator avers that by an act of the General Assembly of the State of Tennessee, passed on the 21st of April, 1899, and approved on the 24th of April, of the same year, being chapter 435 of the session acts of that year, and particularly by the 26th section of said act, and

for the express purpose of imposing a tax on its capital stock," the General Assembly of the State of Tennessee, provided as follows: "Be it further enacted, that this act shall not be so construed, and shall not so operate as to exonerate and release from taxation any company or corporation whose charter exempts stock and shares thereof from taxation; but it is hereby enacted that in all cases where such stock is exempted, such company or corporation shall be assessed in such way as may be lawful; and in all cases in which, by terms or legal effect of the charter, the shares of stock in any corporation are wholly or partially exempt from taxation, or in which a rate of taxation on the shares of stock is fixed and prescribed, and declared to be in lieu of all other taxes for State, county and municipal purposes, shall be assessed and levied at a rate uniform with the rate levied upon other taxable property, upon the capital stock of said corporation, the value of which capital stock shall be fixed and returned by the assessor as being equal to the aggregate, and not less than the actual cash value of all the shares of stock in said corporation, including the net surplus. Provided, however, that where the State has provided in the charter of any such corporation or company that it shall pay a stated per cent. on each share of stock subscribed annually to the State, which shall be in lieu of all other taxes, it shall be entitled to a credit therefor upon its assessment of its capital stock, as hereinbefore provided."

And by the 76th section of the said act, it further enacted, among things, as follows: "Be it further enacted, that in all instances in which current municipal taxes are collected by the county trustee, the following provisions and rules for the collection of delinquent taxes that may be due to said municipalities, and none other, shall prevail and obtain, anything in this act to the contrary notwithstanding.

(1.) The taxes levied and assessed by such municipalities shall become due and delinquent on the dates as now provided by existing laws.

26 (2.) If such municipal taxes be not paid on or before the date fixed for the delinquency thereof, then a penalty of five per cent. thereon shall at once accrue. If the same be not paid on or before the first day of the following month, then an additional penalty of two per cent. thereon shall accrue, and an additional penalty of one per cent. shall accrue on the first day of each month thereafter that the same shall remain unpaid until such penalty shall reach the sum of ten per cent. on the original tax, whereupon the said penalty shall be no further increased.

(3.) The accrual of the penalty aforesaid shall in no respect affect the interest to be paid on said taxes from the date they become delinquent, such interest to be paid as if no penalty had been imposed."

And by the 81st section of said act it was enacted as follows: "Be it further enacted, that any officer whose duty it is to collect county or municipal revenue on property, or privileges, shall have the power, and it is hereby made his duty, where he cannot collect such taxes by the ordinary method of distress and sale, to bring any

and all suits necessary to be brought, or to intervene in any cause where the property, or its proceeds, is liable for the tax, is in the hands of a receiver appointed by either the State or Federal court, to obtain payment of the taxes from the property or its proceeds; and such officer is authorized to employ the necessary counsel to conduct suits and proceedings under this section, and in all suits or proceedings, ten per cent. shall be added to the recovery as counsel fees, in addition to the recovery. This section shall apply to any taxes now due and unpaid, as well as to any that may hereafter become due. A substantial compliance with the provisions of this act shall be sufficient to fix a lien for taxes, and no more irregularities in the assessment of property or polls, or a failure of any official herein named, or of any tax-payer to follow in strict detail the provisions of this act, shall invalidate the assessment of property or polls." And the complainant says that under the act last aforesaid the capital stock has been assessed for taxation for the year 1899, and upon which the defendants will, unless restrained by a writ issuing out of this court, subject it to other suits to collect municipal taxes for the year 1900, the effect of said assessment for the year 1899 being a cloud upon its title to its franchises and properties, and this notwithstanding that it is contractually exempt from the payment of ad valorem taxes upon its capital stock to the said city of Memphis by the judgment and decree of the supreme court of the State
27 of Tennessee, which finally and conclusively determined that the charter tax of one-half of one per cent. is in lieu of all other taxes against said bank on its capital stock, or against the owners of shares of stock. And your orator avers that all of said assessments are illegal, as has been adjudged heretofore, in the aforementioned cause, by the said supreme court of Tennessee, and in the suit aforesaid, which was a controversy between it and the said city of Memphis involving the direct question, upon identically the same facts as hereinbefore set forth, and impair the obligation of its contracts judicially construed, and violation of the contract clause of the Constitution of the United States, and that unless restrained by this honorable court, the defendant, The City of Memphis, and J. H. Alsup, *ex officio* collector of municipal taxes in said city of Memphis, will attempt to levy and collect taxes based upon the aforesaid illegal assessments, and will subject your orator to a multiplicity of suits in order to do so, and impose penalties as well and cast clouds upon its title to its franchises and property, as has hereinbefore — set forth. And the court is pleased to order that the said supplement be considered as incorporated in the original bill just before the prayer thereof, and that the prayer be answered by the insertion of the letters after the word "assessment" wherever it appears in said prayer.

Circuit Court of the United States, Western District of Tennessee.

UNION & PLANTERS' BANK *vs.* CITY OF MEMPHIS and JOHN H. ALSUP, Trustee.	No. 532. In Equity. Demurrer.

Joint and Several Demurrer of the City of Memphis and John H. Alsup, Trustee.

Filed Sept. 8, 1900.

The City of Memphis, and John H. Alsup, trustee, of Shelby county, by protestation, not confessing all or any of the matters and things in the plaintiff's bill of complaint, and its amended and supplemental bill of complaint contained, to be true, in such manner and form as the same is therein set forth and alleged, do jointly and severally demur to said original bill; also to said amended and supplemental bill, and for cause of demurrer show:

28 First. There is no diversity of citizenship, and no Federal question involved herein, and this court is without jurisdiction.

Second. The complainant has an adequate remedy at law; hence this court of equity has no jurisdiction.

Third. The complainant, if it is entitled to any redress at all, has a plain and adequate remedy by paying under protest the tax demanded, and suing to recover back.

Fourth. The former adjudication set up in the bills must be limited to the taxes actually in litigation, and the judgment relied on is not conclusive in respect of taxes assessed for other and subsequent years.

Fifth. The judgment set up as a bar was a judgment of a Tennessee State court adjudicating the liability of the bank for the taxes of certain years other than the years involved in this suit. In Tennessee a judgment in a tax case is not *res adjudicata* as to the taxes of any years except those actually in controversy. This court cannot give to or import into the judgment of the State court another or different effect than that possessed by the judgment under the laws of the State pronouncing the judgment. Hence the adjudication set up in the bills cannot be relied upon as bar to the recovery of the taxes involved in this suit.

Sixth. Since the adjudication relied upon as a bar, the Supreme Court of the United States have expressly held, and it is now the law, that the complainant is not entitled to any exemption from taxation upon its capital stock, and that the charter tax and charter exemption were upon and of the shares of stock, and not the capital stock, and hence the right of the city to tax the complainant's capital stock is no longer an open Federal question, nor an open question of any sort.

Seventh. So much of the bills as relies upon a former adjudica-

tion of the questions involved by the courts of Tennessee raises no Federal question, and as to this part of the bill the Federal court has no jurisdiction.

Eighth. By the injection into the bills of a Federal question repeatedly decided in the courts of last resort against the bank's contention, the bills do not confer upon the Federal court jurisdiction of the purely local question of *res adjudicata*.

Ninth. The Federal court may assume jurisdiction so far as the bills rely upon an impairment of the obligation of a contract as an original question, but the Federal court should decline to exercise jurisdiction of the question of the weight and effect to be given to a former judgment of the State court.

29 Tenth. The capital stock of the complainant is by law subject to taxation by the city of Memphis.

Eleventh. In the suit in which the judgment is relied upon as a bar, the parties were not the same, the statutes under consideration were not the same, the questions of law and fact were not the same, and the subject-matter was not the same, as appear from the bills to be involved herein.

Twelfth. There is no equity on the face of the bills.

Wherefore, and for divers other good causes of demurrer appearing in said original and amended and supplemental bills, the defendants jointly and severally demur thereto, and humbly demand the judgment of this court whether they shall be compelled to make any further or other answer to said bills, and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

JNO. H. WATKINS,
Solicitor for Defendants.

John H. Alsup makes oath that he is one of the above-named defendants; that the foregoing demurrer is not interposed for delay, and that same is true in point of fact.

JNO. H. ALSUP.

Subscribed and sworn to before me, this 8th day of September, 1900.

[L. S.] J. C. ADAMS,
Notary Public.

I hereby certify that, in my opinion, the foregoing demurrer is well founded in point of law.

JNO. H. WATKINS,
Of Counsel for Defendants.

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof, begun and held for its May-November term, A. D. 1900, at the
30 United States court-house in the city of Memphis, in said district, on to wit, the 6th day of November, A. D. 1900, in the following cause, to wit:

THE UNION & PLANTERS' BANK, Plaintiff,
vs.
THE CITY OF MEMPHIS, Defendant. } No. 532.

This cause came on to be heard before the Hon. E. S. Hammond, upon the application of complainant for a restraining order, and upon the demurrer of the defendants to the amended and supplemental bill of complaint. And the court being advised in the premises, is pleased to deny the application of the complainant, and is also pleased to adjudge and decree that the demurrer of the defendants to the original and the amended and supplemental bills be sustained. Wherefore, it is ordered by the court that the bill of complaint and also the amended and supplemental bill herein be dismissed at the cost of the complainant, for which execution may issue against it and William H. Carroll, the surety upon its cost bond.

And from the above decree the complainant prays an appeal to the circuit court of appeals at Cincinnati, at its next term, which is granted upon execution of a bond conditioned according to the Revised Statutes of the United States in such case *as* made and provided. And John H. Watkins, solicitor for the defendant, in open court appearing, waives the service of any citation upon the defendants of the appeal herein prayed.

In the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

UNION & PLANTERS' BANK
vs.
THE CITY OF MEMPHIS.

The appellant, The Union & Planters' Bank, assigns error to the decree of the court below, sustaining demurrers to the original, amended and supplemental bills, because the appellant says it appears by the record herein that it was a banking corporation under a special act of the General Assembly of the State of Tennes-
31 see, and that in a suit instituted in the chancery court of Shelby county, Tennessee, to recover of it ad valorem taxes on its capital stock by the said City of Memphis, alleged to be due to it, the said City of Memphis, under the 14th section of the general

revenue laws of the State, passed in 1887, for the years from 1888 to 1890, inclusive, an issue was joined between the said City of Memphis and the appellant, and the identical question determined was in a suit mentioned and described in the bill of complaint, that by reason of the exemption contained in its charter, the appellant was contractually exempt from paying the said City of Memphis ad valorem taxes on its capital stock, and the record showing and setting forth the aforesaid judgment and decree, the same having been passed and entered by the supreme court of the State of Tennessee, and setting forth the conclusiveness thereof as against the ad valorem taxes claimed by the said City of Memphis for the years 1899 and 1900, under the 16th section of chapter 1 of the Acts of 1897, and the 26th section of chapter 435 of the Acts of 1899, upon assessments made thereunder, of the capital stock of the appellant, and that the aforesaid assessments and the revenue laws under which they were made, cast clouds upon appellant's title to its franchises, and the enforcement thereof was being attempted by the county trustee and the appellant about to be subjected to a multiplicity of suits, and to the imposition of penalties, it was error in the court to have dismissed the bill and not to have held:

I.

That the capital stock of the appellant was, by virtue of its charter, and the adjudications of the supreme court of the State of Tennessee, contractually exempt from the payment of the municipal taxes mentioned in the bill of complaint.

II.

It was error in the court in not sustaining the plea of *res adjudicata* and overruling the demurrers, and in not holding that the appellant was contractually exempt from the payment of municipal taxes upon its capital stock, and that the fact of that exemption was conclusively determined by the presumption of the thing adjudged arising upon the decree of the supreme court of the State of Tennessee in the suit between this appellant and the said City of Memphis, upon the precise facts involved, and where a similar revenue law was attempted to be enforced, and to have further held
32 that the attempt to enforce the assessments and taxes set forth in the bill of complaint would impair the obligation of the contract between the appellant and the State of Tennessee.

III.

It was error for the circuit court not to have held that the revenue laws of 1897 and 1899 were inoperative and inefficacious to impose a tax upon the appellant's capital stock, and the proceedings thereunder were illegal, because the exemption clause of the appellant's charter had previously received the judicial construction, in a suit between the said City of Memphis and the appellant, where the said city was attempting to enforce the collection of the tax under a law in all respects similar to the provisions of the revenue laws afore-

said, and the supreme court of the State of Tennessee having decided that the said tax was illegal by reason of the contract of exemption in appellant's charter, the question therefore of its liability for a like tax in subsequent years, was *res adjudicata*.

CANALL & McKELLAR AND
COOPER & WADDELL,
Sols. for Complainant.

Filed Nov. 5, 1900.

In the Circuit Court of the United States Western District of Tennessee, Western Division.

THE UNION & PLANTERS' BANK OF MEMPHIS
vs.
CITY OF MEMPHIS.
No. 532.
Supersedeas, Bond.

Know all men by these presents, that we, Union & Planters' Bank of Memphis, Tennessee, as principal, and S. P. Read and W. H. Carroll, as sureties, are hereby held and firmly bound unto said City of Memphis in the full and just sum of five hundred dollars, lawful money of the United States, to be paid to the said City of Memphis, for the payment of which, well and truly to be made, we hereby bind ourselves jointly and severally, and our joint and several heirs, executors and administrators, by these presents.

Signed by us, sealed with our seals, and dated at Memphis, Tennessee, this 17 day of September, A. D. 1900.

33 Whereas, the above-named principal has prosecuted a writ of error to the United States circuit court of appeals for the sixth judicial circuit, holden at Cincinnati, in the State of Ohio, to reverse the judgment rendered in the above-entitled suit against said principal by the circuit court of the United States for the western division of the western district of Tennessee.

Now, therefore, the condition of the foregoing obligation is such that if the above-named principal shall prosecute his said writ of error to effect, and answer all costs and damages if he fail to make his plea and the said writ of error good, then this obligation shall be void, otherwise the same shall remain in full force and virtue.

[SEAL.] UNION & PLANTERS' BANK OF MEMPHIS,
By S. P. READ, *R. S.*, [SEAL.]
S. P. READ. [SEAL.]
WM. H. CARROLL. [SEAL.]

Signed, sealed, delivered, taken and acknowledged before me at Memphis, Tennessee, this 5 day of November, A. D. 1900.

JOHN B. CLOUGH,
Clerk of said U. S. Circuit Court,
By W. B. WEISIGER, *D. C.*

Approved at Memphis, Tennessee, on the day of date of the said bond.

E. S. HAMMOND,
United States District Judge.

UNITED STATES OF AMERICA, *Sixth Judicial Circuit,* } ss:

United States Circuit Court of Appeals for the Sixth Circuit.

The President of the United States to the honorable the judges of the circuit court of the United States for the western district of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Union & Planters' Bank of Memphis, Tennessee, and the City of Memphis a manifest error hath happened, to the great damage of the said Union & Planters' Bank, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice
34 done to the parties aforesaid in this behalf, do command you, if the judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the sixth circuit, together with this writ, so that you have the same at Cincinnati, in said circuit, on the 5th day of December next, in the said circuit court of appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, and the seal of said circuit court, the 5th day of November, A. D. 1900, and of the Independence of the United States of America the 125th year.

JOHN B. CLOUGH,
Clerk of the Circuit Court of the United States for the Western District of Tennessee,
By W. M. WEISIGER, *D. C.*

Allowed by—
E. S. HAMMOND,
United States District Judge.

In the United States Circuit Court of Appeals for the Sixth Judicial Circuit, Cincinnati, Ohio.

UNION & PLANTERS' BANK vs. CITY OF MEMPHIS. } No. —. Citation.

To the City of Memphis, Greeting:

You are hereby cited and admonished to be and appear before the United States circuit court of appeals for the sixth judicial circuit, at a session of said court to be held in the city of Cincinnati, in the State of Ohio, in said circuit, on the 5th day of December, A. D. 1900, pursuant to a writ of error filed in the office of the clerk of the

circuit court of the United States for the western division of the western district of Tennessee, wherein Union & Planters' Bank of Memphis, Tennessee, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment ren-
35 dered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 5 day of November, A. D. 1900, and of the Independence of the United States the 125th year.

E. S. HAMMOND, [SEAL.]
U. S. District Judge for the Western District of Tennessee.

Service acknowledged.

JNO. H. WATKINS.
Att'y for City of Memphis.

Sept. 17, 1900.

36 UNITED STATES OF AMERICA, }
Western Division of the Western District of Tennessee. }

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof, begun and held for its November term, A. D. 1900, at the United States court-house in the city of Memphis, in said district, on to wit: the 11th day of February A. D. 1901, in the following cause, to wit:

THE UNION AND PLANTERS' BANK, Plaintiff, }
vs. } No. 532.
THE CITY OF MEMPHIS ET AL., Defendant-. }

And from the decree entered in this cause on the 6th day of November 1900, the complainant prays an appeal to the next term of the Supreme Court of the United States, at Washington, which is granted upon its execution of a bond conditioned according to the Revised Statutes of the United States. And Jno. H. Watkins, Esq., solicitor for the defendant, in open court appearing, objected to the granting of said appeal and moved the court that said appeal be denied. But the court overruled said objection and granted said appeal. To which action of the court the City
37 of Memphis through its counsel, then and there excepted and reserved the benefit thereof, which said exception is allowed and ordered to be entered of record.

38 In the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

Filed February 13, 1901. John B. Clough, Clerk.

UNION & PLANTERS' BANK *vs.* THE CITY OF MEMPHIS. } No. 532. Assignment of Errors.

The appel-ant, The Union & Planters' Bank, assign error to the decree of the court below, sustaining demurrers to the original, amended and supplemental bills, because the appel-ant says it appears by record herein that it is and was a banking corporation under a special act of the General Assembly of the State of Tennessee, and that in a suit instituted in the chancery court of Shelby county, Tennessee, to recover of it ad valorem taxes on its capital stock by the said City of Memphis alledged to be due to it, the said City of Memphis, under the 14th section of the general revenue laws of the State, passed in 1887, for the years 1888, to 1890, inclusive, an issue was joined between the said City of Memphis and the appel-ant, and that the identical question herein for judgment; was determined in the suit mention- and described in the bill of complaint, viz: that by reason of the exemption contained in its charter, the appel-ant was contractually exempt from paying the city of Memphis ad valorem taxes on its capital stock, and the records showing and setting forth the aforesaid judgment and decree of the supreme court of the State of Tennessee as being conclusive in its favor against the ad valorem taxes claimed by the City of Memphis for the years 1899 & 1900, under the 16th, section of chap. 1 of the Acts of 1897 and 26 section of the chapter 435 of the Acts of 1899, upon the assessments made thereunder, of the capital stock of the appel ant and the aforesaid assessments and the revenue law under which they were made, cast clouds upon the appel-ant's case title to its franchises and the enforcements thereof was being attempted by the county trustee and the appel-ant about to be subjected to a multiplicity of suits, and to the imposition of penalties it was error in the court not to have held:

39 I.

That the capital stock of the appel-ant was by virtue of its charter, and the adjudications of the supreme court of the State of Tennessee contractually exempt from the payment of the municipal taxes mention- in the bill of complaint.

II.

It was error in the court in not sustaining the plea of *res adjudicata* and overruling the demurrers and in not holding that the appel-ant was contractually exempt from the payment of municipal taxes upon its capital stock, and that the fact of that exemption was conclusively determined by the presumption of the thing adjudged arising upon the decree of the supreme court of the State of Ten-

nessee, in the suit between this appel-ant and the said City of Memphis upon the precise facts involved, and, where a similar revenue law was attempted to be enforced and to have further held that the attempt to enforce the assessment and taxes set forth in the bill of complain- would impair the obligation of the contract between the appel-ant and the State of Tennessee.

III.

It was error for the circuit court not to have held that the revenue laws of 1897 and 1899 were inoperative and inefficacious to impose a tax upon the appel-ant's capital stock, and the proceedings thereunder were illegal, because the exemption appellant's charter had previously received the judicial construction, in a suit between the said City of Memphis at the appel-ant, where the said city was attempting to enforce the col-ection of the tax under a law in all respects similar to the provisions of the revenue laws aforesaid and the supreme court of the State of Tennessee having decided that the said tax was illegal by reason of the contract of exemption in appellant's charter. the question therefore of its liability for a like tax in subsequent years was *res adjudicata.*

WM. H. CARROLL,
K. D. McKELLAR,
TIM. E. COOPER,
Counsel for U. & P. Bank.

40 In the Circuit Court of the United States, Western District of Tennessee, Western Division.

THE UNION & PLANTERS' BANK OF MEMPHIS *vs.* THE CITY OF MEMPHIS. } No. 532. Supersedeas Bond. Filed February 13th, 1901.

Know all men by these presents, that we Union & Planters' Bank of Memphis Tennessee, as principal, and K. D. McKellar and W. H. Carroll as sureties, are hereby held and firmly bound unto said City of Memphis and John H. Alsup trust. in the full and just sum of five hundred dollars, lawful money of the United States, to be paid to the said City of Memphis for the payment of which well and truly to be made, we hereby bind ourselves jointly and severally, and our joint and several heirs, executors and administrators by these presents.

Signed by us, sealed with our seals, and dated at Memphis, Tennessee, this 13th day of February, 1901.

Whereas, the above-named principal has prosecuted an appeal to the United States Supreme Court held at Washington in the District of Columbia, to reverse the judgment rendered in the above-entitled suit against said principal by the circuit court of the United States for the western division of the western district of Tennessee.

Now, therefore, the condition of the foregoing obligation is such that if the above-named principal shall prosecute its said appeal to effect, and answer all costs and damages if it fail to make its plea

and the said appeal good, then this obligation shall be void, otherwise the same shall remain in full force and virtue.

UNION & PLANTERS' BANK, [SEAL.]
By CARROLL & McKELLAR. [SEAL.]
W. H. CARROLL. [SEAL.]
K. D. McKELLAR. [SEAL.]

Signed, sealed, delivered, taken and acknowledged before me at Memphis, Tennessee, this 13th day of February, A. D. 1901.

JOHN B. CLOUGH,
Clerk of said U. S. Circuit Court.
W. B. WEISIGER, *D. C.*

Approved at Memphis, Tennessee, on the day of date of the said bond.

E. S. HAMMOND,
United States District Judge.

41 UNITED STATES OF AMERICA, } ss:
Sixth Judicial Circuit, }

United States Supreme Court for the Sixth Circuit.

The President of the United States to the honorable the judges of the circuit court of the United States for the western district of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Union & Planters' Bank of Memphis Tennessee, *vs.* The Cit- of Memphis a manifest error hath happened, to the great damage of the said Union & Planters' Bank as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if the judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the fifteenth day of March, A. D. 1901, next, in the said Supreme Court of the United States to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, and the seal of said circuit court the 13th day of February, A. D. 1901 and of the Independence of the United States of America the 124 year.

JOHN B. CLOUGH,
Clerk of the Circuit Court of the United States for the Western District of Tennessee.

Allowed by—
E. S. HAMMOND,
United States District Judge.

42 In the Supreme Court of the United States.

UNION & PLANTERS' BANK OF MEMPHIS
vs.
CITY OF MEMPHIS. } No. 532. Citation.

To the City of Memphis and Jno. H. Alsup, trustee, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United S-ates, at a session of said court to be held in the city of Washington in the District of Columbia, on the 15th day of March A. D. 1901 pursuant to an appeal filed in the office of the clerk of the circuit court of the United States for the western division of the western district of Tennessee, wherein The Union & Planters' Bank of Memphis, Tennessee are appellants and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellants, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 13th day of February, A. D. 1901 and of the Independence of the United States the 124 year.

E. S. HAMMOND, [SEAL.]
U. S. District Judge for the
Western District of Tennessee.

43 Came to hand February 23rd, 1901, and executed on Monday February 25th, 1901 by reading this citation to J. J. Williams mayor of Memphis, J. J. Williams, D. P. Hadden and Hu. L. Brinkley, fire and police commissioners and John H. Alsup, trustee of Shelby county and leaving a copy of said citation with each of them.

T. H. BAKER,
U. S. Marshal,
R. B. FANNING,
Deputy Marshal.

44 THE UNITED STATES OF AMERICA, }
Sixth Judicial Circuit, Western District of Tennessee. }

I, John B. Clough, clerk of the circuit court of the United States, for the western division of said western district of Tennessee, do hereby certify that the papers hereto attached, are full, true, perfect and correct copies of the original record and proceedings in said court as the same now appears of record and upon the files in my office, in the following cause, to wit:

THE UNION & PLANTERS' BANK
vs.
THE CITY OF MEMPHIS and JOHN H. ALSUP, as Trustee of Shelby County, Tennessee. } No. 532.

Seal of the Circuit Court of the United States for the District of West Tennessee.

In testimony whereof, I have hereunto written my name and affixed the seal of said court, at my office in the city of Memphis, Tennessee, this 8th day of March, A. D. 1901, and of the Independence of the United States the 124th year.

JOHN B. CLOUGH, *Clerk.*

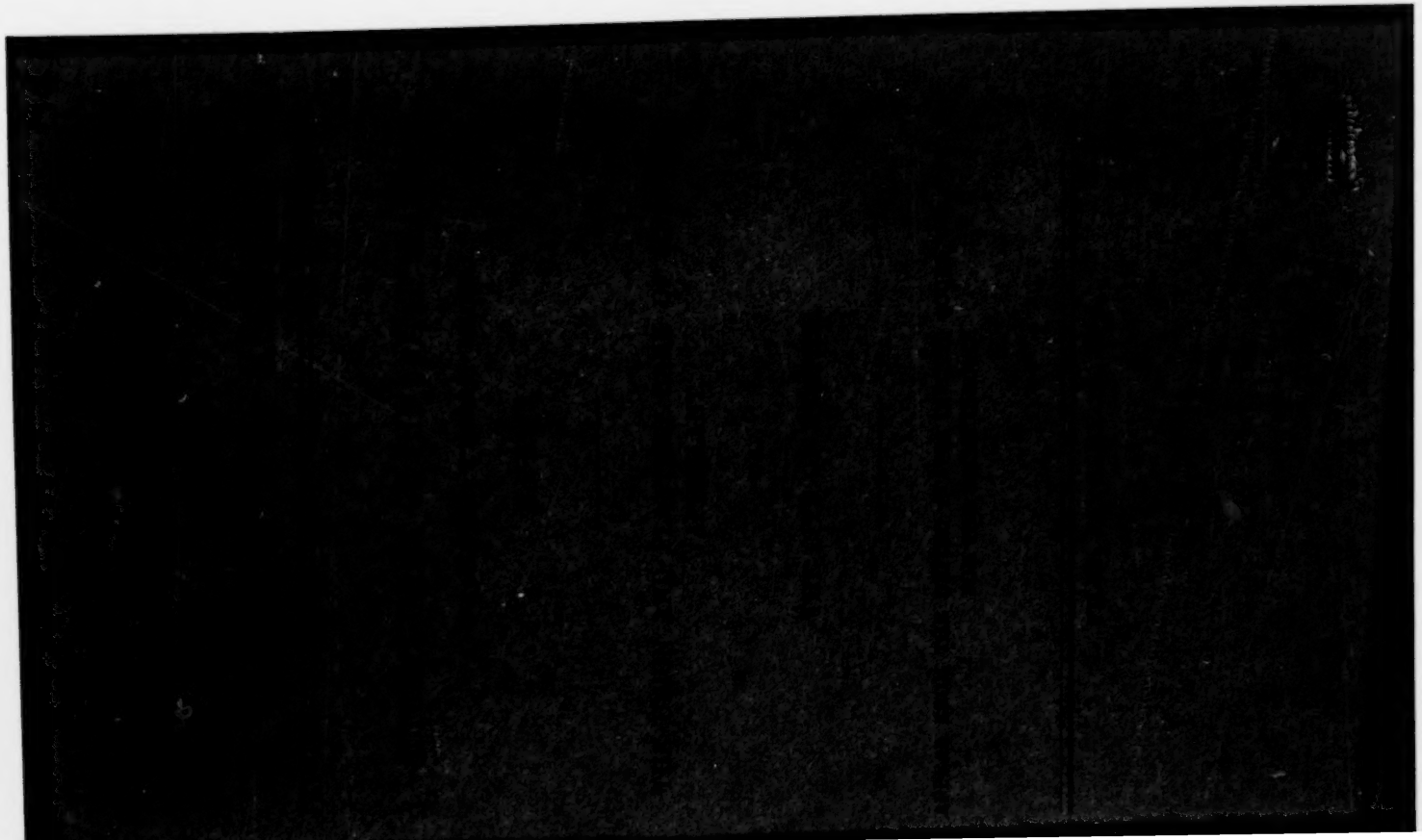
Authentication.

I, E. S. Hammond, a judge of said court, do hereby certify that John B. Clough, whose genuine signature appears to the foregoing certificate is, and was at the date of the same, clerk of said court, and that his attestation is in due form.

E. S. HAMMOND,
Judge of the District Courts of the United States for the District Aforesaid.

[Endorsed:] No. 532. Circuit court of the United States, western district of Tennessee. The Union & Planters' Bank of Memphis *vs.* The City of Memphis *et al.*

Endorsed on cover: File No. 18,089. W. Tennessee C. C. U. S. Term No. 279. The Union and Planters' Bank of Memphis, Tennessee, plaintiff in error, *vs.* The City of Memphis and John H. Alsup, trustee. Filed March 23, 1901.



(18,369.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 221.

THE UNION AND PLANTERS' BANK OF MEMPHIS, APPELLANT,

vs.

THE CITY OF MEMPHIS.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 17, 1902.

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1 *Transcript of Record.*

Filed Apr. 3, 1899. John B. Clough, Clerk.

In the Circuit Court of the United States for the Western Division of the Western District of Tennessee, at Memphis. In Equity.

THE UNION & PLANTERS' BANK, Plaintiff,
vs.
THE CITY OF MEMPHIS and JOHN H. ALSUP, as Trustee of Shelby County, Tennessee, Defendants. } 532.

To the honorable the judges of the circuit court of the United States for the sixth circuit:

Your orator, The Union & Planters' Bank, brings this its bill of complaint against The City of Memphis, a municipal corporation by the laws of the State of Tennessee, and John H. Alsup, as trustee of the county of Shelby, and thereupon complaining it says:

That it is a banking corporation, having its situs at Memphis aforesaid, operating under a special charter granted by the State of Tennessee on the 20th day of March, 1858, and amended by an act passed on the 12th day of February, 1869, and from the date of its organization it has paid to the City of Memphis all the taxes which were assessed against it by the City of Memphis, which it was legally required to do.

That it was for years adjudged, by an unbroken line of decisions in Tennessee, as exempt from the payment of ad valorem taxes to the State of Tennessee, to the county of Shelby, and to the city of Memphis, on account of its shares of stock, other than the charter tax annually to the State of Tennessee. That it has been in

2 many litigations, involving the claim on behalf of the city of Memphis, State of Tennessee and county of Shelby, that it was liable to pay to them, and each of them, ad valorem taxes on different subjects of taxation, and in each and every of said suits your orator maintained that under the clause of its charter, which provided that it should pay annually to the State one-half of one per cent. on each share of capital stock subscribed, it should be exempt from the payment of any other or further tax, either to the State of Tennessee, county of Shelby or the city of Memphis, whether ad valorem taxes or license or privilege taxes.

Your orator further showeth to your honors that on the 22nd day of October, 1891, the State of Tennessee, for the use of the City of Memphis, and the City of Memphis exhibited an original bill in the chancery court of Shelby county, Tennessee, that court having jurisdiction of the subject-matter of the said suit against it, and therein, the said City of Memphis claimed that for the year 1897, its capital stock was assessed for taxation, both by the regular assessor and by the county trustee of Shelby county, at the sum of $400,000.00. That the municipal tax rate for that year was $2.35 on each $100.00,

and the amount due from your orator on account of said capital stock was the sum of $9400.00, with interest from the 1st day of May, 1887.

That for the year 1891 the capital stock of your orator was assessed at the sum of $456,000.00, and that the total tax rate on every $100.00 of property for that year, levied by the State for the use of the city of Memphis, was $1.75 on every $100.00 of property, and that your orator was indebted for municipal taxes in the sum of $7980.00, with interest thereon from the 1st day of May, 1891.

It was further averred in the aforesaid bill of complaint that by section 14 of the revenue laws of the State, passed in 1887, the same being chapter 2 of the acts of that year, it was enacted as follows:

"Be it further enacted, That this act shall not be so construed, and it shall not co-operate as to exonerate or release from taxation, any company or corporation whose charter exempts stock and the shares thereof from taxation, but it is hereby enacted that in all cases where such stock is exempted, such company or corporation shall be assessed in such way as may be lawful; and, in all cases in which, by the terms or legal effect of the charter, the shares of stock in any corporation are wholly or partially exempt from taxation, or in which a rate of taxation on the shares of stock is fixed and
3 prescribed and declared to be in lieu of all the taxes for State, county and municipal purposes, shall be assessed and levied at a rate uniform with the rate levied upon other taxable property upon the capital stock of said corporation, the value of which capital stock shall be fixed and returned by the assessor as being equal to the aggregate market value of all the shares of stock in said corporation, including the net surplus."

The bill also averred that notwithstanding a provision of said section, the capital stock of your orator was not assessed for the years 1888, 1889 or 1890. That ascertaining this fact, the county trustee of Shelby county, as he was by law authorized to do, duly assessed its capital stock for the years aforesaid, and the said City of Memphis was entitled to have and recover on account of the assessments aforesaid of your orator, taxes on its capital stock as follows: For the year 1888, $9400.00; for the year 1889, $9870; for the year 1890, $11,926.25, with interest thereon from the 1st of May of the year for which the assessments were made.

The bill further averred that your orator claimed an exemption by virtue of its original charter, and the amendments thereof, of its capital stock from taxation, and also that the aforesaid provisions of the act of 1887 had been continued in force by the succeeding acts of the legislature of the State of Tennessee, and that under the aforesaid acts, the capital stock of your orator in its hands was subject to ad valorem taxes to the city of Memphis.

The bill further set forth that the exemption claimed by your orator was in these words: "That said company shall pay to the State of Tennessee an annual tax of one-half of one per cent. on each share of stock subscribed, which shall be in lieu of all other taxes."

The cause thereupon came on to be heard upon a demurrer interposed by your orator, which is in these words:

"In Chancery Court of Shelby Co., Tennessee.

STATE OF TENNESSEE, Use, etc.,
vs.
UNION & PLANTERS' BANK & S. P. READ, Cashier. } 8087, R. D.

Defendants demur to the bill filed against them on 22d of
4 Oct., 1891, as entered above on the rule docket. The ground of this demurrer is that the object sought by this bill is to enforce the payment of taxes by said bank in excess of the sum of an annual tax of one-half of one per cent. on each share of stock subscribed, which is the tax by the terms of the charter contract between said bank and the State of Tenn., which shall be in lieu of all other taxes. Defendant says said bank is not liable for nor bound to pay the taxes demanded and sought to be so collected, and that defendant Read, sued as the cashier, cannot be required to answer said bill nor make the discovery sought from him in and of the effort to collect such taxes.

(Signed) CRAFT & CRAFT,
Solicitors for the Defendant."

Before the Hon. J. S. Galloway, sitting by interchange with the chancellor, who finally adjudged and decreed the demurrer to be well taken upon all the points therein set out.

Said City of Memphis appealed from the aforesaid decree and judgment to the next term of the supreme court of Tennessee for the western district of Tennessee, and filed a transcript of the record in said court, and the case was heard by the said supreme court upon the said appeal, when the court, after full consideration, finally adjudged and decreed on the 7th of June, 1892, that there was no error in the decree of the court below, and expressly adjudged all the points covered by and embraced in the opinion filed by the judge who delivered the opinion. All of which will more fully appear from a certified copy of the record, which is herewith filed and made part of this bill, marked Exhibit A, but which need not be copied.

And your orator further shows to the court that in the opinion of the learned judge he expressly held, considering the decisions of the supreme court of Tennessee, and the decisions of the Supreme Court of the United States, and giving them the controlling weight to which they were entitled, that the charter tax of one-half of one per cent. is in lieu of all other taxes, whether against the bank or its capital stock, or against owners on account of their shares of stock.

Your orator further showeth to your honors that the aforesaid judgment in its favor was based upon the identical claim of exemption now asserted by it in order to defeat the taxes now in question,

and to cancel the assessment against it hereinafter to be set
5 forth, and the judgment and decree aforesaid adjudged its claim to exemption upon the identical same facts and conditions as those hereinafter presented, and your orator is advised and insists that the question of its exemption from the payment of ad valorem taxes to the City of Memphis on account of its capital stock, has been finally judicial- determined not to exist because of the judicial construction put upon its exemption in the suit to determine that question between it and the said City of Memphis.

And further complaining, showeth your orator unto your honors, that by chapter 120 of the Acts of 1895, and section — thereof, it was provided that no taxes should thereafter be assessed upon the capital stock of any bank or banking association, but that the shares of stock should be assessed to the individual shareholder, and that under the aforesaid law it was adjudged by the supreme court of the State of Tennessee that its capital stock was not subject to taxation.

Your orator further showeth to your honors that by section 16 of chapter 1 of the Acts of 1887, the General Assembly of the State of Tennessee passed an act which provided as follows:

"Be it further enacted, That this act shall not be so construed, and shall not so operate, as to exonerate and release from taxation any company or corporation whose charter exempts stock and shares thereof from taxation; but it is hereby enacted that in all cases where such stock is ex- (*sic*).

Your orator further showeth to your honors that the aforesaid judgment in its favor was based upon the identical claim of exemption now asserted by it in order to defeat the taxes now in question, and to cancel the assessment against it hereinafter to be set forth, and the judgment and decree aforesaid adjudged its claim to exemption upon the identical facts and conditions as those herein presented. And your orator is advised and insists that this question of its exemption from the payment of ad valorem taxes to the City of Memphis on account of its capital stock, has been thus finally judicially determined in its favor to exist, by a judicial construction of its exemption in the aforesaid suit to determine that very question between it and the said City of Memphis.

And further complaining showeth your orator unto your honors that by chapter 120 of the Acts of 1895 and section 10 thereof, it was provided "that no tax shall hereafter be assessed upon the capital of any bank or banking institution * * * but the share-
6 holders in such bank or other association shall be assessed and taxed upon the market value of their shares of stock therein."

Under the section above, it was also adjudged by the supreme court of the State of Tennessee, that its capital stock was not subject to taxation, and in a suit between said City of Memphis and your orator.

Your orator further avers that subsequently it was enacted as follows: "Be it further enacted, That this act shall not be so construed, and shall not so operate, as to exonerate and release from taxation any company or corporation whose charter exempts stock and shares

thereof from taxation; but it is hereby enacted that in all cases where such stock is exempted, such company or corporation shall be assessed in such way as may be lawful; and in all cases in which, by the terms or legal effect of the charter, the shares of stock in any corporation are wholly or partially exempt from taxation, or in which a rate of taxation on the shares of the stock is fixed and prescribed, and declared to be in lieu of all other taxes for State, county and municipal purposes, shall be assessed and levied at a rate uniform with the rate levied upon other taxable property, upon the capital stock of said corporation, the value of which capital stock shall be fixed and returned by the assessor as being equal to the aggregate market value of all the shares of stock in said corporation, including the new surplus; provided, however, that where the State has provided, in the charter of any such corporation or company, that it shall pay a stated per cent. on each share of stock subscribed, annually, to the State, which shall be in lieu of all other taxes, it shall be entitled annually to a credit therefor upon its assessment of its capital stock, as hereinbefore provided." Section 16 of chap. 1, Acts 1897.

That afterwards, the value of its capital stock was assessed under the aforesaid section at $132,000.00, and the City of Memphis claims that it is liable to it for ad valorem taxes on said assessment for the year 1899, in a sum exceeding $2000.00, exclusive of interest and costs.

Your orator avers that it is contractually exempt from the payment of any ad valorem taxes to the City of Memphis, resulting from the aforesaid provision in its charter, and it also avers that the fact of such exemption was conclusively determined by the presumption of the thing adjudged, resulting from the judgment and decree previously rendered between it and the said City of Memphis, and
7 yet, notwithstanding its aforesaid contractual exemption, and such conclusive determination of such exemption by the presumption of the thing adjudged between it and said City of Memphis, the said City of Memphis is now attempting to enforce the aforesaid assessment and collect a tax based thereon, to the impairment of the obligation of the contract between your orator and the State of Tennessee, which it is advised and avers is protected by the contract clause of the Constitution of the United States.

And your orator further avers that the said John H. Alsup is county trustee of the county of Shelby, in the State of Tennessee, and by virtue of his office, the duty is imposed upon him to collect ad valorem taxes due to the City of Memphis.

Wherefore, in consideration of the premises, your orator prays that the City of Memphis and John H. Alsup, county trustee and *ex officio* collector of municipal taxes for the City of Memphis, be cited to appear and answer the allegations of this bill, conformably to the practice of this court; and that on final hearing your orator have a decree canceling the aforesaid assessment and establishing, as between it and the said City of Memphis, that it is contractually exempt from thelpayment to the said City of Memphis of ad valorem taxes on its capital stock; and all such other and further relief as

may be suitable and proper in the premises, and that a restraining order issue *pendente lite* prohibiting the said John H. Alsup from any attempt to collect or enforce the said assessment until the final decision of this cause.

CANAIL & McKELLAR AND
COOPER & WADDELL,
Sol's for Complainant.

EXHIBIT "A."

STATE OF TENNESSEE, }
Shelby County. }

Be it remembered that at a term of the chancery court of Shelby county, State aforesaid, began and held at the court-house, in the city of Memphis, in and for said county, on Monday, the 5th day of October, 1891, the same being the first Monday in October, 1891—present and presiding, the Hon. J. S. Galloway, probate judge,
8 sitting by interchange with Hon. W. D. Beard, chancellor, being incompetent—the following proceedings were had, to wit:

Original Bill No. 8087, *R. D.*

Filed 22d day of Oct., 1891.

THE STATE OF TENNESSEE, for the Use of the CITY OF MEMPHIS, and the City of Memphis
vs.
THE UNION & PLANTERS' BANK and S. P. READ.

To the Hon. W. D. Beard, chancellor of the chancery court of Shelby county, Tennessee:

Complainants would respectfully state and show to the court as follows, to wit:

I. The above-named defendant, The Union & Planters' Bank, is a banking corporation organized under the laws of the State of Tenn., and having its situs and place of business in the city of Memphis, Shelby county, Tenn. By an act of the legislature of said State, passed on the 20th day of March, 1858, the Desoto Insurance & Trust Company was incorporated with all the powers, privileges and immunities and subject to all the pains, penalties and forfeitures of the act establishing the Bluff City Insurance Company of Memphis. Said act of incorporation will be found in the 12th section of chapter 166 of the Acts of 1857–'8.

The said act incorporating the Bluff City Insurance Company of Memphis will be found in the same chapter, to wit, 166, of the Acts of 1857–'8, and sections one to ten thereof, inclusive. By the tenth section of said act incorporating the Bluff City Insurance Company it was enacted, "that said company shall pay to the State of Tenn. an annual tax of one-half of one per cent. on each share of stock subscribed, which shall be in lieu of all other taxes."

Said Desoto Insurance & Trust Company was empowered to do a general fire and life insurance business, with a capital stock of not less than $300,000. By the subsequent act of the legislature, passed Feb'y 12th, 1869, said corporation was authorized to abandon
9 the business of insurance and adopt that of banking, under the name and style of the Union & Planters' Bank of Memphis, with the privilege of increasing their capital stock to a sum not exceeding $1,000,000, and retaining "all their present rights, privileges, and immunities, excepting that of insurance." Shortly after the date of said amending act the privilege aforesaid was accepted by the stockholders of the corporation, the name changed to that of the Union & Planters' Bank of Memphis, the business of insurance abandoned and that of banking adopted, and from that time forth to the present day the said corporation has been engaged in the banking business in the city of Memphis, its banking-house and business being located and carried on in the 4th ward of the city, the capital, under the privilege granted by said amending act, being increased to and has been since that time maintained at $600,000, the same being divided into shares of $100 each.

For the year 1887 the capital stock of the defendant company was duly assessed both by the regular assessing officer and by the county trustee at the sum of $400,000.00; the municipal tax rate for that year $2.35, and the amount due from the defendant bank upon the theory that the shares of stock therein are exempt from taxation in the sum of $9,400.00, with interest from May 1st, 1887. For the year 1891 the capital stock of said Union & Planters' Bank in Memphis was assessed at the sum of $456,000. The State of Tennessee for that year levied a total tax rate of $1.75 on every $100.00 of property in the city of Memphis, for the use of said city, and the said defendant corporation is therefore indebted to the State for the use of said city or to said city directly in the sum of $7,980, the unpaid tax on the capital stock aforesaid for said year 1891, and the sum last aforesaid bears interest at the rate of six per cent. per annum from the 1st day of May, 1891.

III. By section 14 of the general revenue laws of the State, passed in 1887, the same being chapter 2 of the Acts of that year, it was enacted as follows, to wit: "Be it further enacted, That this act shall not be so construed, and shall not so operate, as to exonerate or release from taxation any company or corporation whose charter exempts stock and shares thereof from taxation; but it is hereby enacted that in all cases where such stock is exempted such company or corporation shall be assessed in such way as may be lawful; and in all cases in which by the terms or legal effect of the charter, the shares of the stock in any corporation are wholly or partially exempt from taxation, or in which a rate of taxation
10 on the shares of stock is fixed and prescribed and declared to be in lieu of all the taxes for State, county and municipal purposes, shall be assessed and levied at a rate uniform with the rate levied upon other taxable property upon the capital stock of said corporation, the value of which capital stock shall be fixed and returned by the assessor as being equal to the aggregate market value

of all the shares of stock in said corporation, including the net surplus."

But, notwithstanding the provisions of said section, the capital stock of said corporation was not assessed for the years 1888, 1889 or 1890. Ascertaining this fact, the county trustee of Shelby county, as he was by law authorized to do, has duly assessed paid capital stock for the year aforesaid as follows, to wit:

For the year 1888	$400,000
For the year 1889	404,000
For the year 1890	675,000

For the year 1888 the city ad valorem was $2.35 on the $100.00. For the year 1889 the ad valorem taxation in and for the said city was $2.35 on the $100.

For the year 1890 the ad valorem taxation in and for said city levied by the State was $2.35 on the $100.00, so that said defendant corporation for the years aforesaid is indebted to complainant City of Memphis, or to the State for its use in the sums following, to wit:

For the year 1888	$9,400 00
For the year 1889	9,870 00
For the year 1890	11,926 25

Each of the several amounts aforesaid bears interest from the first day of May of the year for which the tax was levied.

IV. The defendant corporation claims that by virtue of its original charter and amendments thereto its capital stock is exempt from taxation.

Said capital stock is assessable and taxable under sec. 14 aforesaid of chapter 2 of the Acts of 1887, the said section having been continuously in force since said enactment to the present time.

For the year 1872 the State, county of Shelby, and city of
11 Memphis, under the legislation of the State then in force undertook to assess and tax as other property was assessed and taxed for that year the shares of the stock in the hands of the stockholders of said company. This effort to tax said shares of stock was resisted by said shareholders; litigation ensued in the second chancery court of Shelby county, Tenn. The controversy in that court was determined in favor of the shareholders and against the power of the State, county and city to tax the shares of stock, and appeal therefrom was taken to the supreme court of the State, in which the decree of said chancery court was reversed and a decree rendered in favor of the power of the State to tax said shares, from which last decree a writ of error was sued out from the Supreme Court of the United States, and under a hearing in that court the decree of the supreme court of Tenn. was reversed, the case remanded to that court with directions to enter a decree affirming the decree of the second chancery court of Shelby county negativing the power to tax said shares of stock in the hands of the stockholders. Complainants are advised that the capital stock in the hands of the corporation and the shares of stock in the hands of the stockholders are

separate and distinct subjects of taxation; that in the absence of any exemption clause it was without the power of the State, without subjecting such legislation to the objection of double taxation, to have taxed both the capital stock of the corporation and the shares of stock in the hands of the stockholders; that the charter tax or bonus, or whatever else it may be called, of one-half of one per cent. to be paid to the State is a tax upon the shares of stock, and that the language, "in lieu of all other taxes," means in lieu of all other taxes on the shares of stock. It has no effect, as complainant is advised and charges, to exempt the capital stock of the corporation from taxation.

V. Complainants are advised that under the provisions of the act of 1887 aforesaid, which act, so far as is material to the questions here involved, has been continuously in force, the capital stock of said corporation or the shares of stock in the hands of the stockholders is or are taxable. They are further advised that the immunity and exemption embraced or claimed to be embraced in the charter of said defendant corporation cannot operate to exempt both the shares of stock and the capital stock in the hands of the corporation from taxation. Being advised and believing that both the corporation and the capital stock and the shares of stock could not successfully claim the exemption from taxation, the assessing officers of the State have from year to year since and including the year
12 1887 demanded of the proper officers of said corporation a list of the names of the persons owning the shares of stock therein on the 10th day of January of each year, but the said corporation, by its officers, claiming that the shares of stock were not subject to taxation, have refused to furnish the names of the shareholders in said corporation when demanded as aforesaid. The said officers accordingly for the years 1889 and 1890 assessed the shares of stock in the following form, to wit:

"Bank, Union & Planters'.

"Unknown shares and stock, 6,000 shares, $404,000," and the assessment for the year 1890 was made upon "the unknown owners of 6,000 shares of stock of Union & Planters' bank—valuation $675,000."

Complainants are not informed who are the owners of said shares of stock. They are informed that it is claimed in their behalf by the officers of the bank representing them that the said shares of stock are not taxable, and, even if taxable, the assessment is void for indefiniteness and uncertainty.

To the end that complainants may fairly and properly test the question as to whether, by legal effect of the charter of the defendant corporation, both the shares of stock in the hands of the stockholders and the capital stock in the hands of the bank are exempt from taxation. S. P. Read, cashier of said bank and the custodian of its books now and for many years heretofore, including the year 1887, is made a defendant hereto, and is required in his answer to state, under oath, from the books of said defendant corporation, the names of all persons, firms, or corporations owning shares of stock in said bank on the 10th day of January of each and every year, and the amount

held by each since and including the year 1887. It is the purpose of the complainant, when the name of such shareholders shall be furnished in the manner aforesaid, to have said shares of stock assessed for each of the years aforesaid and to bring the shareholders before the court in this proceeding by such amended and supplemental pleadings as may be necessary. Complainants do not claim that both the shares of stock in the hands of the shareholders and the capital stock in the hands of the corporation was undertaken to be taxed by the legislature of the State, but they do claim that for and since the year 1887 the revenue laws of the State provided generally that the corporate property in the hands of the corporation should not be taxed, and that the shares of stock in such cor-
13 poration should be assessed to and taxed to the shareholders at their market value.

It was further provided by said act of 1887 and by the succeeding biennial session of the legislature of the State, as already appears by the quotation hereinbefore made of section 14 of the Act of 1887, that the capital stock in the hands of the corporation should be taxed if by charter provisions the shares of stock were not subject to taxation. Wherefore complainant desires that both the corporation and the shareholders may be brought before the court in one proceeding, and that it may then be determined whether the tax is validly levied on the shares of stock in the hands of the stockholders or on the capital stock in the hands of the corporation. Complainants do not concede, but, on the contrary, deny, that the aforesaid assessment of the shares of stock for the years 1889 and 1890 are void and invalid, and when the names of the stockholders have been brought before the court the amount of tax due from each of them under said assessment will be shown and judgment prayed for against them.

VI. Complainants have been informed that since the adoption by the State of Tenn. of the constitution of 1870 the defendant banking company has increased its capital stock. It is advised in that event the new stock is taxable. It asks that the defendant, S. P. Read, may, on his oath, state in his answer whether or not the capital stock of the defendant banking company has been increased, and, if so, to what extent, since the adoption of the constitution of the State of 1870, to wit: since the 4th day of May, 1870, and that he may further on oath state the date or dates of such increase of stock, if it has been increased more than once since the date last aforesaid, and that from the books of said company he may furnish a list of the persons, firms, or corporations owning shares of stock on the 10th day of January of each year since and including the year 1887, that has been issued since the adoption of the constitution of the State, on the 4th day of May, 1870. This discovery on oath is asked to the end that the said shares of stock may be assessed so far as the same has not already been legally done, and that the owners thereof may — appropriate amends and supplemental pleadings be brought before the court in this cause for the purpose of enforcing and collecting the tax dues therefrom.

VII. By an act of the legislature passed March 19, 1889, and ap-

proved March 23, 1889, the same being chapter 104 of the
14 Acts of 1889, a privilege tax on banking within and for the city of Memphis (then the taxing district of Shelby county) was levied in terms following, to wit: "On the privilege of banking, $1 on every $1,000 of paid-in capital stock, but in no case less than $50 annually."

Complainants state that the amount of capital of the defendant banking company since and during the year 1889 has been $600,000, and that under the enactment aforesaid the said defendant banking company is indebted to the State of Tenn., for the use of the city of Memphis, or to the city of Memphis directly in the sum of $600 annually, payable at the dates of the passage of the act last aforesaid for the year 1889, and on the first day of Jan'y for the years 1890 and 1891.

Premises considered, complainants pray that the parties named as such in the caption be made defendants hereto; that copy and subpœna issue, returnable to the next December rule day of the court; that the defendant corporation answer under its corporate seal; that the other defendants answer under oath the specific matters as asked in the body of the bill; that the court may determine whether the corporation or the shareholders therein have any immunity from taxation under the charter of said company; that complainants may have a decree against the defendant corporation for such taxes, with proper interest, as may be legally due from it, and may have such further and general relief as in equity they ought to have upon the facts stated.

F. T. EDMONSON,
METCALF & WALKER,
Sol's for Complainants.

Cost Bond.

We, the City of Memphis, as principal, and —— ——, as surety, acknowledge ourselves indebted to Union & Planters' Bank & *al.* in the sum of two hundred and fifty dollars; to be void if the said City of Memphis, complainant in a bill which has this day been filed in the chancery court of Shelby county against the said Union & Planters' Bank & *al.*, shall pay all such costs as may be awarded against it by the court in its decrees and orders in said cause.

This 22d day of October, A. D. 1891.

S. P. WALKER.
F. T. EDMONDSON.
C. W. METCALF.

15 *Demurrer of Defendants.*

Filed Nov. 6, 1891.

In Chancery Court of Shelby County, Tennessee.

STATE OF TENNESSEE, Use, &c.,
vs.
UNION & PLANTERS' BANK & S. P. READ, Cashier. } 8087, R. D.

Defendants demur to the bill filed against them on 22d Oct., 1891, as entered above on the rule docket. The ground of this demurrer is that the object sought by this bill is to enforce the payment of taxes by said bank in excess of the sum of an annual tax of one-half of one per cent. on each share of stock subscribed, which is the tax by the terms of the charter contract between said bank and the State of Tenn., which shall be in lieu of all other taxes. Defendant says said bank is not liable for nor bound to pay the taxes demanded and sought to be collected, and that defendant Read, sued as the cashier, cannot be required to answer said bill nor make the discovery sought from bill in and of the effort to collect such taxes.

CRAFT & CRAFT,
Sol's for Defendant.

Final Decree.

Entered M'ch 28th, 1892.

STATE OF TENNESSEE, &c.,
vs.
UNION & PLANTERS' BANK ET AL.

This cause came on to be heard upon bill of complaint and demurrer of defendant, before his honor J. S Galloway, judge of probate court of Shelby county, sitting in this court by interchange with Hon. W. D. Beard, who, having been of counsel in said case, was therefore incompetent to hear the same. Upon argument had by counsel the court orders, adjudges, and decrees that said demurrer is well taken upon all points therein set out, and the same is
16 sustained and the bill of complaint dismissed with costs, for which execution may issue against it and S. P. Walker, C. W. Metcalf and F. T. Edmondson, sureties on cost bond, from which the complainant prays an appeal to next term of supreme court, to be held at Jackson, Tenn., on 1st Monday in April next, which appeal is granted upon complainants giving bond security for cost as the law directs.

Appeal Bond.

We, the State of Tenn., for use of City of Memphis, and surety, J. J. Williams, acknowledge ourselves indebted to the Union & Planters' Bank *et al.* in the sum of two hundred and fifty dollars; to

be void of the State of Tenn., for use, &c., who has prayed for and obtained an appeal from the decree of the chancery court of Shelby county, in a cause in which The State of Tenn., for use of City of Memphis, is complainant and The Union & Planters' Bank *et al.*, defendants, to the next term of the supreme court of Tenn., for the district of West Tenn., to be held at Jackson, Madison county, on the first Monday of April next, shall pay all such costs as shall be awarded it by said supreme court.

This 1st day of April, 1892.

STATE OF TENN., [SEAL.]
By METCALF & WALKER, *Att'ys.*
J. J. WILLIAMS. [SEAL.]

STATE OF TENN., }
Shelby Co. }

I, E. B. McHenry, clerk and master of the chancery court of Shelby county, do hereby certify that the foregoing 24 pages contain a full, true, and perfect transcript of all the proceedings had in a certain cause wherein The State of Tenn., for use, &c., complainant, and Union & Planters' Bank *et al.* defendant-, as the same appears of record and on file in my office.

In testimony whereof I have hereunto set my hand and fixed the seal of said court, at office, in Memphis, this the 31st day of March, A. D. 1892.

[SEAL.]

E. B. McHENRY, *C. & M.*,
By T. B. CALDWELL, *D. C. & M.*

THE STATE OF TENNESSEE:

I, John W. Buford, clerk of the supreme court of said State for the western division thereof, at Jackson, do hereby certify that the foregoing is a true, perfect, and complete copy of the transcript
17 pronounced by said court at its April term, 1892, in the case of State of Tenn., use, &c., against Union & Planters' Bank *et al.*, as appears of record now on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the court, at office, in the city of Jackson, on this the 24th day of March, A. D. 1893, and of the Independence of the United States the 117th year.

[L. S.]

JOHN W. BUFORD, *Clerk*,
By W. H. TIDWELL, *D. C.*

THE STATE OF TENNESSEE:

Pleas before the Supreme Court of said State for the Western Division Thereof at the April Term, A. D. 1892.

Present: The Hon. W. C. Caldwell, acting chief justice, and D. L. Snodgrass, H. H. Lurton, L. Lehman, and B. J. Lea, associate judges, when the following proceedings were had, to wit:

JUNE 7TH, 1892.

STATE OF TENNESSEE, Use, &c., vs. UNION & PLANTERS' BANK. } No. 50, Shelby C. D.

This cause was heard upon the transcript of the record from the chancery court of Shelby county, and it appearing to the court that in the decree below is no error, it is therefore considered by the court that the decree be affirmed, complainant's bill dismissed, and the City of Memphis and S. P. Walker and C. W. Metcalf and F. T. Edmondson, sureties on cost bond, pay the costs of the court below, and they and J. J. Williams, surety on appeal bond, pay the cost of the appeal, for which let execution issue. The court adjudicates none of the points raised by the demurrer of the defendants except those covered by and embraced in the opinion filed, being of opinion that such other points are immaterial after the ruling made in said opinion.

THE STATE OF TENNESSEE:

I, John W. Buford, clerk of the supreme court of said State for the western division thereof, at Jackson, do hereby certify
18 that the foregoing is a true, perfect and complete copy of the decree pronounced by said court at its April term, 1892, in the case of State of Tenn., use, &c., against Union & Planters' Bank *et al.* as appears of record now on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the court, at office, in the city of Jackson, on this the 24th day of March, A. D. 1893, and of the Independence of the United States the 117 year.

JNO. W. BUFORD, *Clerk*,
By W. H. TIDWELL, *D. C.*

Filed April 3, 1899.

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee. }

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof, begun and held for its November term, A. D. 1898, at the United States court-house in the city of Memphis, in said district, on, to wit: the 3d day of April, A. D. 1899, in the following cause, to wit:

UNION & PLANTERS' BANK, Plaintiff, vs. THE CITY OF MEMPHIS ET AL., Defendants. } No. 532.

This day comes complainant, by its solicitors, and files in this court here its bill in this cause and gives the usual bond for costs, and it is ordered that the usual summons issue to next rules.

No. 532. Circuit court of the United States, western district of Tennessee. Union & Planters' Bank *vs.* City of Memphis *et al.* Order of court. Entered and filed 3 day of April, A. D. 1899. John B. Clough, clerk.

The President of the United States of America to the marshal of the western district of Tennessee, Greeting:

You are hereby commanded to summons the City of Memphis, a municipal corporation by the laws of the State of Tennessee,
19 and John H. Alsup, trustee of the county of Shelby, in the State of Tennessee, citizens of the State of Tennessee, if to be found within your district, to appear before the circuit court of the United States in the sixth circuit for the western district of Tennessee, at Memphis, in said district, on the first Monday in May next, and then and there to plead, answer or demur to the bill filed in the office of the clerk of said court on the third day of April, A. D. 1899, against said defendants by the Union & Planters' bank, a banking corporation having its situs at Memphis aforesaid, operating under a special charter granted by the State of Tennessee, and who is a citizen of the State of Tennessee. Herein fail not, and have you then and there this writ.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court at Memphis, this third day of April, A. D. 1899, and the 123d year of American Independence.

[L. S.] JOHN B. CLOUGH, *Clerk.*

Memorandum.

The said defendants are required to enter appearance in this suit in the office of the clerk of the circuit court at Memphis, Tennessee, on or before the day on which the subpœna is returnable, or the allegations of the bill herein will be taken for confessed against said defendant and judgment rendered accordingly..

JOHN B. CLOUGH, *Clerk.*

Marshal's Return.

This writ came to hand on the date of its issuance, and I duly executed the same, as herein commanded, by making the contents thereof known to the within-named defendant, J. J. Williams, mayor of the city of Memphis, at Memphis, Tennessee, on the 7th day of April, A. D. 1899, and at the same time and place delivering to him a duly certified copy thereof together with such copy of the bill in this cause; and I further executed this writ by making known the contents thereof to the defendant, John H. Alsup, at Memphis, Tennessee, on the 7th day of April, A. D. 1899, and also then and there delivering to him like copy of the same, and of said bill; and I further executed this writ by making known the contents thereof to the defendant, —— ——, at ——, Tennessee, on the

— day of —— A. D. 189–, and also then and there delivering to him like copy of the same, and of the said bill.

Memphis, Tennessee, —— A. D. 189–.

T. H. BAKER,
U. S. Marshal,
By R. H. McNEELY, *Deputy.*

20 No. 532. Circuit court of the United States, western district of Tennessee. Union & Planters' Bank *vs.* City of Memphis, John H. Alsup, trustee. Summons. Issued 3 day of April, 1899. J. B. Clough, clerk. Returnable April A. D. 1899. Carroll & McKellar, Cooper & Waddell, attorneys.

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof, begun and held for its November term, A. D. 1898, at the United States court-house in the city of Memphis, in said district, on to wit, the 18 day of May, A. D. 1899, in the following cause, to wit:

UNION & PLANTERS' BANK, Plaintiff,
vs.
CITY OF MEMPHIS ET AL., Defendant. } No. 532.

For satisfactory reasons to the court appearing it is hereby ordered by the court that the above cause in equity and all motions pending therein, be and the same are hereby continued to the next term of this court.

No. 532. Circuit court of the United States, western district of Tennessee. Union & Planters' Bank *vs.* City of Memphis *et al.* Order of court. Entered and filed 18 day of May, A. D. 1899. John B. Clough, clerk.

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof, begun and held for its May term, A. D. 1899, at the United States
21 court-house in the city of Memphis, in said district, on to wit, the 10 day of July, A. D. 1899, in the following cause, to wit:

UNION & PLANTERS' BANK, Plaintiff,
vs.
CITY OF MEMPHIS ET AL., Defendant. } No. 532.

This cause coming on this day to be heard before the Hon. E. S. Hammond, judge, upon motion of defendant- to dismiss the bill of complaint herein, for want of jurisdiction, which motion having been argued by counsel and considered by the court, it is ordered, adjudged and decreed by the court that said motion be overruled and defendants given five days in which further to plead.

No. 532. Circuit court of the United States, western district of Tennessee. Union & Planters' Bank *vs.* City of Memphis, *et al.* Order of court. Entered and filed 10 day of July, A. D. 1899. John B. Clough, clerk.

Circuit Court of the United States, Western District of Tennessee.

UNION & PLANTERS' BANK
vs.
CITY OF MEMPHIS and JOHN H. ALSUP, Trustee. } No. 532.

Demurrer. Filed Aug. 7, 1899.

Joint and Several Demurrer of the City of Memphis and John H. Alsup, Trustee.

The City of Memphis and John H. Alsup, trustee of Shelby county, jointly and severally demur to the bill of complaint filed against them herein, and for grounds of their demurrer they say:

First. There is no diversity of citizenship and no Federal question involved herein, and this court is without jurisdiction.

Second. The complainant has an adequate remedy at law; hence this court has no jurisdiction.

Third. The complainant, if it is entitled to any redress at all has a plain and adequate remedy by paying under protest the tax demanded, and suing to recover back.

22 Fourth. The former adjudication set up in the bill must be limited to the taxes actually in litigation and the judgment relied on is not conclusive in respect of taxes assessed for other and subsequent years.

Fifth. Since the adjudication relied upon as a bar, the Supreme Court of the United States and the supreme court of Tennessee have expressly held and it is now the law that the complainant is not entitled to any exemption from taxation upon its capital stock, that the charter tax and charter exemption were upon and of the shares of stock and not the capital stock, and hence the right of the city to tax the complainant's capital stock is no longer an open Federal question, nor an open question of any sort.

Sixth. So much of the bill as relies upon a former adjudication of the question involved by the courts of Tennessee raises no Federal question, and as to this part of the bill the Federal court has no jurisdiction.

Seventh. By the injection into the bill of a Federal question, repeatedly decided in the courts of last resort against the bank's contention, the bill does not confer upon the Federal court jurisdiction of the purely local question of *res adjudicata*.

Eighth. The Federal court may assume jurisdiction so far as the bill relies upon an impairment of the obligation of a contract as an original question, but the Federal court should decline to exercise jurisdiction of the question of the weight and effect to be given to a former judgment of the State court.

Ninth. The capital stock of the complainant is by law subject to taxation by the city of Memphis.

Tenth. In the suit in which the judgment is relied on as a bar the parties were not the same, the statutes under consideration were not the same, the questions of law and fact were not the same, and the subject-matter was not the same, as appear from the bill to be involved herein.

Eleventh. There is no equity on the face of the bill.

Wherefore the defendants pray that the bill be dismissed and that they go hence with their costs in this behalf; and will ever pray, &c.

JOHN H. WATKINS,
Solicitor for Defendants.

SHELBY COUNTY, }
Tennessee. }

John H. Alsup, makes solemn oath and says that he is one of the above-named defendants and that the foregoing demurrer is not interposed for delay and that the same is true in point of fact.

JNO. H. ALSUP.

23 Subscribed and sworn to before me this 7th day of August, 1899.

[SEAL.] JAMES BRETT, JR.,
Notary Public.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

JNO. H. WATKINS,
Counsel for Defendants.

UNITED STATES OF AMERICA, }
Western Division of the Western District of Tennessee. }

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof, begun and held for its May term, A. D. 1899, at the United States courthouse in the city of Memphis, in said district, on to wit, the 25 day of November, A. D. 1899, in the following cause, to wit:

UNION & PLANTERS' BANK, Plaintiff,
vs.
CITY OF MEMPHIS ET AL., Defendant. } No. 532.

For satisfactory reasons to the court appearing it is hereby ordered by the court that the above-entitled cause be and it is hereby continued to the next term of this court.

No. 532. Circuit court of the United States, western district of Tennessee. U. & P. Bank *vs.* City of Memphis. Order of court. Entered and filed 25 day of Nov., A. D. 1899. John B. Clough, clerk.

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof, begun and held for its November term, A. D. 1899, at the United
24 States court-house in the city of Memphis, in said district, on to wit, the 24 day of May, A. D. 1900, in the following cause, to wit:

THE UNION & PLANTERS' BANK, Plaintiff,
vs.
THE CITY OF MEMPHIS ET AL., Defendant. } No. 532.

For satisfactory reasons to the court appearing it is hereby ordered by the court that the above cause be and it is hereby continued to the next May term of this court.

No. 532. Circuit court of the United States, western district of Tennessee. Union & Planters' Bank *vs.* City of Memphis. Order of court. Entered and filed 24 day of May, A. D., 1900. John B. Clough, clerk.

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof, begun and held for its May term, A. D. 1900, at the United States court-house in the city of Memphis, in said district, on to wit, the 5 day of November, A. D. 1900, in the following cause, to wit:

THE UNION & PLANTERS' BANK, Plaintiff,
vs.
THE CITY OF MEMPHIS ET AL., Defendant. } No. 532.

This cause came on to be heard upon the application of the complainant to file a supplement to its original bill herein, and the court being advised in the premises, is pleased to order, adjudge and decree that leave be granted, and accordingly the said bill is amended by adding before its prayer in the words and figures following:

"And now by way of supplement and amendment to the bill herein, by leave of the court first had and obtained, your orator avers that by an act of the General Assembly of the State of Tennessee, passed on the 21st of April, 1899, and approved on the 24th of April, of the same year, being chapter 435 of the Session Acts of that year, and particularly by the 26th section of said act, and for the express purpose of imposing a tax on its capital stock," the General Assembly of the State of Tennessee, provided as follows: "Be it further enacted, That this act shall not be so construed, and shall not so operate as to exonerate and release from taxation any company or corporation whose charter exempts stock and shares thereof from taxation; but it is hereby enacted that in all cases where such stock is exempted, such company or corporation shall be assessed in such way as may be lawful; and in all cases in which, by the terms or legal effect of the charter, the shares of stock in any corporation are wholly or partially exempt from taxation, or in which a rate of taxation on the shares of the stock is fixed and prescribed, and declared to be in lieu of all other taxes for State, county and municipal purposes, shall be assessed and levied at a rate uniform with the rate levied upon other taxable property, upon the capital stock of said corporation, the value of which capital stock shall be fixed and returned by the assessor as being equal to the aggregate, and not less than the actual cash value of all the shares of stock in said corporation, including the net surplus. Provided, however, that where the State has provided in the charter of any such corporation or company that it shall pay a stated per cent. on each share of stock subscribed annually to the State, which shall be in lieu of all other taxes, it shall be entitled to a credit therefor upon its assessment of its capital stock, as hereinbefore provided."

And by the 76th section of the said act, it further enacted, among other things, as follows: "Be it further enacted, That in all instances in which current municipal taxes are collected by the county trustee, the following provisions and rules for the collection of delinquent taxes that may be due to said municipalities, and none other, shall prevail and obtain, anything in this act to the contrary notwithstanding.

(1.) The taxes levied and assessed by such municipalities shall become due and delinquent on the dates as now provided by existing laws.

(2.) If such municipal taxes be not paid on or before the date fixed for the delinquency thereof, then a penalty of five

per cent. thereon shall at once accrue. If the same be not paid on or before the first day of the following month, then an additional penalty of two per cent. thereon shall accrue, and an additional penalty of one per cent. shall accrue on the first day of each month thereafter that the same shall remain unpaid until such penalty shall reach the sum of ten per cent. on the original tax, whereupon the said penalty shall be no further increased.

(3.) The accrual of the penalty aforesaid shall in no respect affect the interest to be paid on said taxes from the date they become delinquent, such interest to be paid as if no penalty had been imposed."

And by the 81st section of said act it was enacted as follows: "Be it further enacted, That any officer whose duty it is to collect county or municipal revenue on property, or privileges, shall have the power, and it is hereby made his duty, where he cannot collect such taxes by the ordinary method of distress and sale, to bring any and all suits necessary to be brought, or to intervene in any cause where the property or its proceeds, is liable for the tax, is in the hands of a receiver appointed by either the State or Federal court to obtain payment of the taxes from the property or its proceeds; and such officer is authorized to employ the necessary counsel to conduct suits and proceedings under this section, and in all suits or proceedings, ten per cent. shall be added to the recovery as counsel fees, in addition to the recovery. This section shall apply to any taxes now due and unpaid, as well as to any that may hereafter become due. A substantial compliance with the provisions of this act shall be sufficient to fix a lien for taxes, and no more irregularities in the assessment of property or polls, or a failure of any official herein named, or of any tax-payer to follow in strict detail the provisions of this act, shall invalidate the assessment of property or polls." And the complainant says that under the act last aforesaid the capital stock has been assessed for taxation for the year 1899, and upon which the defendants will, unless restrained by a writ issuing out of this court, subject it to other suits to collect municipal taxes for the year 1900, the effect of said assessment for the year 1899 being a cloud upon its title to its franchises and properties, and this notwithstanding that it is contractually exempt from the payment of ad valorem taxes upon its capital stock to the said city of Memphis, by the judgment and decree of the supreme court of the State of Tennessee, which finally and conclu-
27 sively determined that the charter tax of one-half of one per cent. is in lieu of all other taxes against said bank on its capital stock, or against the owners of shares of stock. And your orator avers that all of said assessments are illegal, as has been adjudged heretofore, in the aforementioned cause, by the said supreme court of Tennessee, and in the suit aforesaid, which was a controversy between it and the said city of Memphis involving the direct question, upon identically the same facts as hereinbefore set forth, and impair the obligation of its contracts judicially construed, and violation of the contract clause of the Constitution of the United States, and that unless restrained by this honorable court, the defendant, The City of Memphis, and J. H. Alsup, *ex officio* collector of

municipal taxes in said city of Memphis, will attempt to levy and collect taxes based upon the aforesaid illegal assessments, and will subject your orator to a multiplicity of suits in order to do so, and impose penalties as well and cast clouds upon its title to its franchises and property, as has — hereinbefore set forth. And the court is pleased to order that the said supplement be considered as incorporated in the original bill just before the prayer thereof, and that the prayer be answered by the insertion of the letters after the word "assessment" wherever it appears in said prayer.

Circuit Court of the United States, Western District of Tennessee.

UNION & PLANTERS' BANK vs. CITY OF MEMPHIS and JOHN H. ALSUP, Trustee. } No. 532. In Equity. Demurrer.

Filed Sept. 8, 1900.

Joint and Several Demurrer of the City of Memphis and John H. Alsup, Trustee.

The City of Memphis, and John H. Alsup, trustee, of Shelby county, by protestation, not confessing all or any of the matters and things in the plaintiff's bill of complaint, and its amended and supplemental bill of complaint contained, to be true, in such manner and form as the same is therein set forth and alleged, do jointly and severally demur to said original bill; also to said amended and supplemental bill, and for cause of demurrer show:

28 First. There is no diversity of citizenship, and no Federal question involved herein, and this court is without jurisdiction.

Second. The complainant has an adequate remedy at law; hence this court of equity has no jurisdiction.

Third. The complainant, if it is entitled to any redress at all, has a plain and adequate remedy by paying under protest the tax demanded, and suing to recover back.

Fourth. The former adjudication set up in the bills must be limited to the taxes actually in litigation, and the judgment relied on is not conclusive in respect of taxes assessed for other and subsequent years.

Fifth. The judgment set up as a bar was a judgment of a Tennessee State court adjudicating the liability of the bank for the taxes of certain years other than the years involved in this suit. In Tennessee a judgment in a tax case is not *res adjudicata* as to the taxes of any years except those actually in controversy. This court cannot give to or import into the judgment of the State court another or different effect than that possessed by the judgment under the laws of the State pronouncing the judgment. Hence the adjudication set up in the bills cannot be relied upon as bar to the recovery of the taxes involved in this suit.

Sixth. Since the adjudication relied upon as a bar, the Supreme

Court of the United States have expressly held, and it is now the law, that the complainant is not entitled to any exemption from taxation upon its capital stock, and that the charter tax and charter exemption were upon and of the shares of stock, and not the capital stock, and hence the right of the city to tax the complainants' capital stock is no longer an open Federal question, nor an open question of any sort.

Seventh. So much of the bills as relies upon a former adjudication of the questions involved by the courts of Tennessee raises no Federal question, and as to this part of the bill the Federal court has no jurisdiction.

Eighth. By the injection into the bills of a Federal question repeatedly decided in the courts of last resort against the bank's contention, the bills do not confer upon the Federal court jurisdiction of the purely local question of *res adjudicata*.

Ninth. The Federal court may assume jurisdiction so far as the bills rely upon an impairment of the obligation of a contract as an original question, but the Federal court should decline to exercise jurisdiction of the question of the weight and effect to be given to a former judgment of the State court.

29 Tenth. The capital stock of the complainant is by law subject to taxation by the city of Memphis.

Eleventh. In the suit in which the judgment is relied upon as a bar, the parties were not the same, the statutes under consideration were not the same, the questions of law and fact were not the same, and the subject-matter was not the same, as appear from the bills to be involved herein.

Twelfth. There is no equity on the face of the bills.

Wherefore, and for divers other good causes of demurrer appearing in said original and amended and supplemental bills, the defendants jointly and severally demur thereto, and humbly demand the judgment of this court whether they shall be compelled to make any further or other answer to said bills, and pray to be hence dismissed with their costs and charges in this behalf most wrongfuly sustained.

JNO. H. WATKINS,
Solicitor for Defendants.

John H. Alsup makes oath that he is one of the above-named defendants; that the foregoing demurrer is not interposed for delay, and that same is true in point of fact.

JNO. H. ALSUP.

Subscribed and sworn to before me, this 8th day of September, 1900.

[L. S.]

J. C. ADAMS,
Notary Public.

I hereby certify that, in my opinion, the foregoing demurrer is well founded in point of law.

JNO. H. WATKINS,
Of Counsel for Defendants.

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof, begun and held for its May-November term, A. D. 1900, at the
30 United States court-house in the city of Memphis, in said district, on to wit, the 6th day of November, A. D. 1900, in the following cause, to wit:

THE UNION & PLANTERS' BANK, Plaintiff,
vs.
THE CITY OF MEMPHIS, Defendant. } No. 532.

This cause came on to be heard before the Hon. E. S. Hammond, upon the application of complainant for a restraining order, and upon the demurrer of the defendants to the amended and supplemental bill of complaint. And the court being advised in the premises, is pleased to deny the application of the complainant, and is also pleased to adjudge and decree that the demurrer of the defendants to the original and the amended and supplemental bills be sustained. Wherefore, it is ordered by the court that the bill of complaint and also the amended and supplemental bill herein be dismissed at the cost of the complainant, for which execution may issue against it and William H. Carroll, the surety upon its cost bond.

And from the above decree the complainant prays an appeal to the circuit court of appeals at Cincinnati, at its next term, which is granted upon execution of a bond conditioned according to the Revised Statutes of the United States in such case as made and provided. And John H. Watkins, solicitor for the defendant, in open court appearing, waives the service of any citation upon the defendants of the appeal herein prayed.

In the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

UNION & PLANTERS' BANK
vs.
THE CITY OF MEMPHIS.

The appellant, The Union & Planters' Bank, assigns error to the decree of the court below, sustaining demurrers to the original, amended and supplemental bills, because the appellant says it appears by the record herein that it was a banking corporation under a special act of the General Assembly of the State of Ten-
31 nessee, and that in a suit instituted in the chancery court of Shelby county, Tennessee, to recover of it ad valorem taxes on its capital stock by the said City of Memphis, alleged to be due

to it, the said City of Memphis, under the 14th section of the general revenue laws of the State, passed in 1887, for the years from 1888 to 1890, inclusive, an issue was joined between the said City of Memphis and the appellant, and the identical question determined was in a suit mentioned and described in the bill of complaint, that by reason of the exemption contained in its charter, the appellant was contractually exempt from paying the said City of Memphis ad valorem taxes on its capital stock, and the record showing and setting forth the aforesaid judgment and decree, the same having been passed and entered by the supreme court of the State of Tennessee, and setting forth the conclusiveness thereof as against the ad valorem taxes claimed by the said City of Memphis for the years 1899 and 1900, under the 16th section of chapter 1 of the Acts of 1897, and the 26th section of chapter 435 of the Acts of 1899, upon assessments made thereunder, of the capital stock of the appellant, and that the aforesaid assessments and the revenue laws under which they were made, cast clouds upon appellant's title to its franchises, and the enforcement thereof was being attempted by the county trustee and the appellant about to be subjected to a multiplicity of suits, and to the imposition of penalties, it was error in the court to have dismissed the bill and not to have held:

I.

That the capital stock of the appellant was, by virtue of its charter, and the adjudications of the supreme court of the State of Tennessee, contractually exempt from the payment of the municipal taxes mentioned in the bill of complaint.

II.

It was error in the court in not sustaining the plea of *res adjudicata* and overruling the demurrers, and in not holding that the appellant was contractually exempt from the payment of municipal taxes upon its capital stock, and that the fact of that exemption was conclusively determined by the presumption of the thing adjudged arising upon the decree of the supreme court of the State of Tennessee in the suit between this appellant and the said City of Memphis, upon the precise facts involved, and where a similar revenue law was attempted to be enforced, and to have further held that the attempt to
32 enforce the assessments and taxes set forth in the bill of complaint would impair the obligation of the contract between the appellant and the State of Tennessee.

III.

It was error for the circuit court not to have held that the revenue laws of 1897 and 1899 were inoperative and inefficacious to impose a tax upon the appellant's capital stock, and the proceedings thereunder were illegal, because the exemption clause of the appellant's charter had previously received the judicial construction, in a suit between the said City of Memphis and the appellant, where the said city was attempting to enforce the collection of the tax under a law in all respects similar to the provisions of the revenue laws afore-

said, and the supreme court of the State of Tennessee having decided that the said tax was illegal by reason of the contract of exemption in appellant's charter, the question therefore of its liability for a like tax in subsequent years, was *res adjudicata*.

CANALL & McKELLAR AND
COOPER & WADDELL,
Sol's for Complainant.

Filed Nov. 5, 1900.

In the Circuit Court of the United States, Western District of Tennessee, Western Division.

THE UNION & PLANTERS' BANK OF Memphis
vs.
CITY OF MEMPHIS.
} No. 532. Supersedeas Bond.

Know all men by these presents, that we, Union & Planters' Bank of Memphis, Tennessee, as principal, and S. P. Read and W. H. Carroll, as sureties, are hereby held and firmly bound unto said City of Memphis in the full and just sum of five hundred dollars, lawful money of the United States, to be paid to the said City of Memphis, for the payment of which, well and truly to be made, we hereby bind ourselves jointly and severally, and our joint and several heirs, executors and administrators, by these presents.

Signed by us, sealed with our seals, and dated at Memphis, Tennessee, this 17 day of September, A. D. 1900.

33 Whereas, the above-named principal has prosecuted a writ of error to the United States circuit court of appeals for the sixth judicial circuit, holden at Cincinnati, in the State of Ohio, to reverse the judgment rendered in the above-entitled suit against said principal by the circuit court of the United States for the western division of the western district of Tennessee.

Now, therefore, the condition of the foregoing obligation is such that if the above-named principal shall prosecute his said writ of error to effect, and answer all costs and damages if he fail to make his plea and the said writ of error good, then this obligation shall be void, otherwise the same shall remain in full force and virtue.

[SEAL.] UNION & PLANTERS' BANK OF MEMPHIS, [SEAL.]
By S. P. READ, *R. S.* [SEAL.]
S. P. READ. [SEAL.]
WM. H. CARROLL.

Signed, sealed, delivered, taken and acknowledged before me at Memphis, Tennessee, this 5 day of November, A. D. 1900.

JOHN B. CLOUGH,
Clerk of said U. S. Circuit Court,
By W. B. WEISIGER, *D. C.*

Approved at Memphis, Tennessee, on the day of date of the said bond.

E. S. HAMMOND,
United States District Judge.

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA, *Sixth Judicial Circuit,* } ss:

The President of the United States to the honorable the judges of the circuit court of the United States for the western district of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Union & Planters' Bank of Memphis, Tennessee, and the City of Memphis a manifest error hath happened, to the great damage of the said Union & Planters' Bank, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done
34 to the parties aforesaid in this behalf, do command you, if the judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the sixth circuit, together with this writ, so that you have the same at Cincinnati, in said circuit, on the 5th day of December next, in the said circuit court of appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, and the seal of said circuit court, the 5th day of November, A. D. 1900, and of the Independence of the United States of America the 125th year.

JOHN B. CLOUGH,
Clerk of the Circuit Court of the United States for the Western District of Tennessee.
By W. M. WEISIGER, *D. C.*

Allowed by

E. S. HAMMOND,
United States District Judge.

In the United States Circuit Court of Appeals for the Sixth Judicial Circuit, Cincinnati, Ohio.

UNION & PLANTERS' BANK
vs.
CITY OF MEMPHIS. } No. —. Citation.

To the City of Memphis, Greeting:

You are hereby cited and admonished to be and appear before the United States circuit court of appeals for the sixth judicial circuit, at a session of said court to be held in the city of Cincinnati, in the State of Ohio, in said circuit, on the 5th day of December, A. D. 1900, pursuant to a writ of error filed in the office of the clerk of the circuit court of the United States for the western division of the western district of Tennessee, wherein Union & Planters' Bank of Memphis, Tennessee, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the
35 judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 5 day of November, A. D. 1900, and of the Independence of the United States the 125th year.

E. S. HAMMOND, [SEAL.]
U. S. District Judge for the Western District of Tennessee.

Service acknowledged.

JNO. H. WATKINS,
Att'y for City of Memphis.

Sept. 17, 1900.

THE UNITED STATES OF AMERICA,
Sixth Judicial Circuit, Western District of Tennessee. }

I, John B. Clough, clerk of the circuit court of the United States, for the western division of the western district of Tennessee, do hereby certify that the paper hereto attached is a full, true, perfect and correct copy of the original record and proceedings in said court as the same now appears of record and upon the files in my office in the following cause, to wit:

THE UNION & PLANTERS' BANK
vs.
THE CITY OF MEMPHIS and JNO. H. ALSUP, as Trustee of Shelby Co., Tennessee. } No. 532.

In testimony whereof, I have hereunto written my name and affixed the seal of said court, at my office in the city of Memphis, Tennessee, this 22d day of November, A. D. 1900, and of the Independence of the United States the 124th year.

[SEAL.] JOHN B. CLOUGH, *Clerk.*

Authentication.

I, E. S. Hammond, a judge of said court, do hereby certify that John B. Clough, whose genuine signature appears to the fore-
36 going certificate is, and was at the date of the same, clerk of said court, and that his attestation is in due form.

E. S. HAMMOND,
Judge of the District Courts of the United States for the District Aforesaid.

No. 532 eq. Circuit court of the United States, western district of Tennessee. Union & Planters' Bank *vs.* City of Memphis *et al.*

37 And afterwards to wit on November 27th 1800 præcipe for appearance of counsel was filed which is in the words and figures as follows:

38 United States Circuit Court of Appeals for the Sixth Circuit, October Term, 1900.

UNION & PLANTERS' BANK
vs.
CITY OF MEMPHIS. } No. 924.

To the clerk of said court:

Please enter *my* appearance as counsel for the plaintiff in error.

WM. H. CARROLL.
KENNETH D. McKELLAR.

☞ NOTE.—Must be signed by a member of the bar of Supreme Court of the United States or of any circuit court of the United States, and by individual (not firm) name.

39 And afterwards to wit on June 10th 1901, an entry was made upon the journal of said court which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

UNION & PLANTERS' BANK OF MEMPHIS
vs.
CITY OF MEMPHIS.

Lurton, Day & Severens, JJ.

This cause is argued for appellants by Messrs. Wm. H. Carroll and Timothy E. Cooper and for appellee by Mr. John H. Watkins and is submitted.

And afterwards to wit on October 21st 1901, a decree was entered in said cause clothed in the words and figures as follows:

Decree.

40 United States Circuit Court of Appeals for the Sixth Circuit.

UNION & PLANTERS' BANK OF MEMPHIS
vs.
CITY OF MEMPHIS. } No. 924.

Appeal from the circuit court of the United States for the Western district of Tennessee.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the western district of Tennessee, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said circuit court, in this cause be and the same is hereby affirmed with costs.

41 And afterwards to wit on October 28th 1901 an opinion was rendered in said cause which is in the words and figures as follows:

Opinion.

42 United States Circuit Court of Appeals, Sixth Circuit.

THE UNION AND PLANTERS' BANK OF Memphis, Appellant,
vs.
THE CITY OF MEMPHIS, Appellee. } No. 924. Appeal from the Circuit Court of the United States for the Western District of Tennessee.

Submitted June 10, 1901. Decided Oct. 21, 1901.

Before Lurton, Day, and Severens, circuit judges.

The case is this: In 1859 the State of Tennessee, by its General Assembly, granted a charter under which the Union and Planters' bank was organized. That charter contained a provision upon the subject of taxation in these words: "That said company shall pay to the State of Tennessee an annual tax of one-half of one per cent. on each share of stock subscribed, which shall be in lieu of all other taxes."

The complainant's bill avers that in impairment of the obligation of this contractual exemption from every tax except that provided by the charter, the State of Tennessee has passed a law providing, among other things, for the assessment of State, county and city taxes upon the capital stock of this and all other corporations having like contractual exemptions, and that the city of Memphis under and in pursuance of the legislation referred to has assessed an ad valorem tax for the year 1899 upon the capital stock of the complainant bank for municipal purposes exceeding $2,000.00, and is about to distrain, etc.

It is averred that the law under which this assessment has been made impairs the obligation of the contract by which complainant is exempt from all taxation upon its capital stock other than
43 that provided for in its charter. It is then averred that in a former litigation between this complainant and the city of Memphis where it was sought to enforce a municipal assessment of taxes upon complainant's capital stock for the years 1888, 1889 and 1890, it was solemnly adjudged and decided that under the charter provision aforesaid the capital stock of said corporation was exempt from all general taxation. The record in the said suit and the judgment therein rendered, being a judgment of the supreme court of Tennessee, is set out in full and plead and relied upon as an adjudication estopping the said city of Memphis from bringing the validity or the true and proper construction and meaning of said provision again into controversy. The bill is most specific in averring that the judgment so plead and set out as establishing the exemption of its said capital stock from taxation was based upon the identical claim of exemption now asserted by it in order to defeat the taxes now in question, and that "the judgment and decree aforesaid adjudged its claim to exemption upon the identical same facts and conditions" as those appearing herein.

Upon this former judgment between the same parties and upon the same facts and issues the complainant bank avers and contends that the question of the right of the city of Memphis to assess its capital stock "has been finally judicially determined not to exist, because of the judicial construction put upon its exemption in the suit to determine that question between it and the said City of Memphis."

The defendant filed a demurrer assigning no less than twelve reasons why the complainant's bill should not be sustained. This demurrer was sustained and the bill dismissed.

LURTON, circuit judge, having made the foregoing statement of the case, proceeded then to deliver the opinion of the court.

1. The demurrers which go to the jurisdiction of the court are not well founded. The jurisdiction does not depend upon diversity of citizenship, for that does not exist, but upon the Federal question arising out of the alleged violation of the obligation of the contract contained in the charter of the complainant corporation.

The bill attacks the constitutionality of the revenue laws of 1897 and 1899 so far as they authorize the imposition of a tax upon the capital stock of the Union and Planters' bank as a law impairing the obligation of the charter exemption. Bank of Kentucky *v.* Stone, 88 F. R. 383, 390; Stone, auditor, *v.* Farmers' Bank of Kentucky, 174 U. S. 409, 412.

44 2. Neither is the demurrer to the equitable jurisdiction of the court well founded.

The remedy by suit at law to recover a tax paid under protest given by the Tennessee act of 1873, ch. 44, being section 1059 Shannon's Revision of the Tennessee Code, applies only to revenue due the State. City of Nashville *v.* Smith, 2 Pickle, 213.

It has no application where the tax complained of is one assessed by a county or city. In such case the only legal remedy to recover an illegal tax is that furnished by the common law. Railroad *v.* Williams, 101 Tenn. 146.

There must exist some equitable ground for relief besides the mere illegality of the tax. If it appears that the tax constitutes a cloud upon the title of the complainant, or that he will be subjected to irremediable damages, or to a multiplicity of suits, if compelled to rely upon his legal remedy alone, equity will interpose upon the ground of the inadequacy of the remedy at law. Dows *v.* Chicago, 11 Wall. 198; Union Pacific R'y *v.* Cheyenne, 113 U. S. 516, 525; Ogden City *v.* Armstrong, 168 U. S. 224, 238; Bank of Kentucky *v.* Stone, 88 F. R. 383.

The case made by the bill is not the case of an objection to a single or particular assessment. The complainant sets up a claim of complete exemption not only against the particular assessment, but against all future efforts to assess its capital stock. As observed by Chief Justice Marshall in Osborn *v.* Bank, 9 Wheat. 738, 842, "the single act of levying the tax, in the first instance, is the cause of an action at law; but that affords a remedy only for the single act, and is not equal to the remedy in chancery, which prevents its repetition and protects the privilege."

The bill in substance avers that there have been many previous litigations between the complainant and the State of Tennessee, the county of Shelby and the city of Memphis, in which the right to levy taxes upon its capital stock was asserted and the exemption claimed under the charter was denied. Complainant sets out in full one such former litigation with the city of Memphis, resulting in a judgment of the supreme court of the State judicially determining the exemption of its capital stock from any and all taxes other than the charter tax.

Notwithstanding these former litigations the defendant is charged with persisting in a denial of the exemption claimed. Under such circumstances it would appear that the complainant is entitled to the remedy in chancery for the purpose of preventing repetitions of such assessments in the future, and thereby preventing a multiplicity of suits. Bank of Kentucky *v.* Stone, 88 F. R. 383, 392; Morris
45 Canal & Banking Co. *v.* Mayor of Jersey City, 12 N. J. Eq. 227; High on Inj., sec. 530.

3. Is the capital stock of the complainant company contractually exempt from taxation other than the charter tax of one-half of one per cent. on each share of stock subscribed?

Does this exemption apply to the corporate capital in the hands of the corporation, or to the shares of capital stock in the hands of shareholders, or are both species of property equally exempt from any tax other than that payable by the express provision of the charter?

Curiously enough we are not lacking in very high authority upholding each of three possible constructions of the taxing clause of the complainant's charter.

Thus in Memphis *v.* Farrington, 8 Bax. 539, the supreme court of

Tennessee held that language similar and identical in meaning found in the charters of a number of Tennessee banks and insurance companies operated only to exempt the capital stock of such corporation in the hands of the corporation upon the payment of the charter tax stipulated for, but that shares of stock, being a distinct property, were not exempt, but were subject to taxation in the hands of shareholders. This decision was made in 1876, in a case between a stockholder in the complainant bank, as well as in other corporations, in which Farrington stood for and represented the entire class of stockholders, the City of Memphis and the State of Tennessee being the adversary parties. The complainant corporation was not a party to the suit and the real question involved was that of the taxability of shares of stock in the hands of shareholders.

That case was taken, on writ of error, to the Supreme Court of the United States and there reversed, that court holding in an opinion by Justice Swayne, that the exemption granted extended to the shares in the hands of shareholders. Three members of the court dissented, holding that the exemption did not extend to shareholders, and that the judgment of the Tennessee court should be affirmed. The judgment of the Tennessee court was accordingly reversed and the shareholders held to be exempt from any tax other than that stipulated to be paid by the corporation. Farrington *v.* Tennessee, 95 U. S. 679.

In Bank of Commerce *v.* McGowan, 6 Lea. 703, the liability of the Bank of Commerce to be assessed upon its bank building and upon several parcels of realty bought in payment of debt was involved.

The court held that the bank building was exempt under
46 a provision of the charter providing that the bank "shall pay to the State an annual tax of one-half of one per cent. on each share of its capital stock, which shall be in lieu of all other taxes," but that this exemption would not extend to the real estate bought in satisfaction of debt due the bank. This result was reached upon the assumption of the exemption of the capital stock of the bank and upon the authority of the case of the De Soto Bank *v.* Memphis, 6 Bax. 415, where it was held that the bank's power to hold real estate was limited by the charter to the real estate necessary for the conduct of its business and the corporate capital used for the purposes of the corporation, and that the contract ceased to operate when taxable property was held for other purposes. In respect of the opinion of the Supreme Court of the United States in Farrington *v.* Tennessee, 95 U. S. 679, Judge Cooper, speaking for the court, said:

"There is nothing in conflict with this view, as the learned counsel of the complainant seem to think, in the decision of the Supreme Court of the United States in Farrington *v.* Tennessee, 95 U. S. 679. It was there held that the provision in a bank charter, like the one before us, is a contract, and will protect the shares of the stockholders from additional taxation. We recognize the controlling authority of that court in such cases, and yield to its decisions. The provision in question will, therefore, protect the capital stock and

the shares of the stockholders from any taxation beyond that prescribed in the charter."

That case was affirmed upon a writ of error sued out by the bank, the case being reported as the Bank of Commerce *v.* State of Tennessee, 104 U. S. 493. Both of these decisions were made in 1881.

The next opinion in point of time proper to be referred to is that of the City of Memphis against the Union and Planters' Bank, the appellant herein, in which the city sought by a bill in equity to compel the payment of city taxes for the years 1887 to 1891, inclusive, assessed upon the corporate capital of the bank. The bill also sought to compel the payment of a privilege tax for the years 1889, 1890 and 1891 imposed by the city for the right of exercising its franchises of doing a banking business in the city.

The bill averred that the bank claimed an exemption from all taxation upon its capital stock as distinguished from the shares in the hands of stockholders by virtue of the charter contract heretofore set out and claimed that it was neither subject to the ad valorem or privilege tax which had been imposed, and therefore refused to pay. The contention of the city as set out on the
47 face of its bill was that the true and proper interpretation of the charter exemption referred to was to exempt the shares in the hands of shareholders from any tax other than that which the bank was required to pay under its charter, and that the corporation as such was liable to pay taxes upon its capital stock and upon its franchises notwithstanding the terms of the charter.

The court sustained the demurrer of the defendant bank and dismissed the bill, holding that the bank was exempt from both species of tax by reason of its charter exemption.

Touching the former decisions of the court construing and applying the charter exemption involved, Judge Caldwell, speaking for the court, said:

"Since the decision in the Farrington case by the Supreme Court of the United States, this court has uniformly adhered to its previous holding, that no ad valorem tax can lawfully be laid on the capital stock, and, in recognition of that decision, has gone further, and said that shares of stock are likewise exempt from other taxation than that prescribed in the charter." Bank of Commerce *v.* McGowan, 6 Lea, 705; The State *v.* Butler, 13 Lea, 406; The State *v.* Butler, 2 Pickle, 633.

Continuing, the learned judge said:

"Considering the decisions of the Supreme Court of the United States in Farrington *v.* Tennessee, 95 U. S. 679, and in Bank *v.* Tennessee, 104 U. S. 493, together, and giving them the controlling weight to which they are entitled, it cannot be held otherwise than that the charter tax of one-half of one per cent. is in lieu of all other taxes, whether against the bank on its capital stock or against owners on shares of stock. Under the construction there given, the charter exemption includes both.

"As an original question, we would hold as held by this court in Memphis *v.* Farrington, 8 Bax. 539, and charge the stockholders with an ad valorem tax; but upon authority, we hold as stated above.

"This court has never decided, and, in the absence of the ruling of the Supreme Court of the United States in Farrington *v.* Tennessee 95 U. S. 679, would not now decide that the charter gives the owners of shares of stock any immunity or exemption from taxation on the shares. That question is now adjudged alone upon the authority of that case. It did not arise, and was not adjudged, in Bank of Commerce *v.* McGowan, 6 Lea, 705; in The State *v.* Butler, 13 Lea, 406, or in The State *v.* Butler, 2 Pickle, 633.

"Complainant seeks, in addition to what has already been stated, to recover from the bank $1,800.00 as privilege taxes for the years 1889, 1890 and 1891. These taxes are claimed from the corporation for the right of exercising its franchises—for the privilege of doing a banking business. Manifestly, the charter tax was intended
48 to cover this right or privilege. The language of the charter implies, that, in consideration of the public good and the payment of the tax therein specified, the State will allow the corporation to exercise the franchises granted without further taxation. City of Memphis *v.* Hernando Ins. Co., 6 Bax. 527; Union Bank *v.* State, 9 Yerg. 490.

"The case of New Orleans City, etc., *v.* New Orleans, 143 U. S. 192, is not, as we understand it, an authority against this ruling. There the contract afforded 'no evidence of an intention' to exempt the corporation from license or privilege tax (*ib.*, 195); here the intention to do so is clear and unmistakable. The charter tax was imposed primarily as a consideration for the corporate franchises and the right to exercise them. No other reasonable construction can be placed upon the words of the charter.

"The State is bound by its contract; and so, likewise, is the city of Memphis, which is but an arm or agency of the State government. This is true not only as to privilege taxes, but also with respect to the other taxes claimed in this case. All subjects of taxation covered by the charter tax are exempt from further assessment, whether made in behalf of the State, county or municipality.

"As to those subjects, the specified tax is in lieu of all the other taxes—State, county and municipal. Such is the undoubted meaning of the contract. City of Memphis *v.* Hernando Ins. Co., 6 Bax. 527; Union Bank *v.* The State, 9 Yerg. 490; Nashville *v.* Thomas, 5 Cold. 600."

The effect of the judgment in the case last-cited as an estoppel and bar to the assessment of taxes upon the capital stock of the appellant bank by the city of Memphis is the principal question in the case now before us.

For the present, however, we will continue the history of the litigations which involve the extent of the exemption.

The next decision in point is that of Shelby County *v.* Union & Planters' Bank, 161 U. S. 149. In that case the charter exemption here involved was construed as not including capital stock or surplus and accumulated profit, and as exempting only the shares of stock in hands of the shareholders. The Farrington case, 95 U. S. 679, is there construed as not inconsistent with the conclusion stated.

After the decision last cited the city of Memphis again sought to

tax the capital stock of the complainant bank and assessed same for the years 1896 and 1897.

The bank filed its bill in a chancery court of the State to enjoin the city from enforcing the collection of said tax and set out in its said bill two distinct grounds upon which it resisted the enforcement of said assessment.

1. That its capital stock was exempt under the charter provision already mentioned, and that such exemption had been duly adjudged in previous litigations which had the force of *res adjudicata.*

49 2. That the revenue law of the State provided that "no tax shall hereafter be assessed upon the capital stock of any bank, banking association or loan or trust, insurance or investment companies, but the shareholders in such bank or other association shall be assessed and taxed upon the market value of their shares of stock herein."

The city answered, asserting its power to make said assessments, and denied the exemption of the complainant's capital stock under its charter, and denied the force of the former decision as *res adjudicata.* After answering, the city filed a cross-bill for the purpose not only of enforcing the payment of the ad valorem tax so assessed against the capital stock of said bank, but also for the purpose of compelling payment of certain privilege taxes due the city for the same year.

Upon the pleadings and proofs the chancellor held the bank not liable for either tax, and perpetually enjoined the city from enforcing payment and dismissed the cross-bill. From this decree the city appealed to the supreme court of the State of Tennessee, which reversed the decree of the court below, holding that the capital stock was not exempt, but that the particular assessments complained of were invalid because the revenue law of the State did not provide for the assessment of the capital stock of any bank. It further held that the privilege tax was authorized under the existing law and the bank liable therefor.

In respect to the force and effect of the former decision of the same court adjudging the capital stock not liable to any general taxation as *res adjudicata*, the court held:

1. "That the effect of the decision in favor of the exemption of such capital stock from general taxation was nullified by the later decision of the Supreme Court of the United States in the case of Shelby County *v.* Union and Planters' Bank, 161 U. S. 149, holding that the charter exemption had no application to corporate capital stock.

2. "That its former judgment involved a different cause of action, to wit: the taxes assessed for years prior to the assessment then complained of, and that 'the plea of *res adjudicata* is to be limited to the taxes actually in litigation and is not conclusive in respect of taxes assessed for other and subsequent years.'"

It is plain from this history of the litigation involving the scope of the charter exemption claimed, and of like exemptions in other charters, that as a mere question of authority the exemption claimed in favor of appellant's capital stock does not exist, and that this

court in the interpretation of the charter exemption should accept as authoritative the opinion of the Supreme Court of the United
50 States in Shelby County *v.* Union and Planters' Bank, 161 U. S. 149.

But the duty of interpreting the scope and meaning of the exemption clause may be regarded as eliminated if it be true, as claimed, that the exemption exists as claimed because it has been so determined by the judgment relied upon as *res adjudicata*.

On this point, in New Orleans *v.* Citizens' Bank, 167 U. S. 371, 387, Mr. Justice White, speaking for the court, in a case where a charter exemption was claimed from general taxation by force of certain former judgments, said:

"Of course, if the judgments are the things adjudged and conclusively determined as between parties that the exemption of the bank under its charter exists, to the extent determined by the judgments, the duty in that regard of discussing the charter itself will be eliminated, since the effect of the thing adjudged will be to settle that question."

Passing then the interpretation of the scope of the charter exemption as an original question, and as effected by the decisions heretofore made considered as mere authorities, we come to the examination of the effect of the judgment of the supreme court of Tennessee pronounced in a suit wherein the present complainant and appellant, The Union and Planters' Bank, and The City of Memphis, the present defendant and appellee, were adversary parties; and in which it was adjudged and determined, that the charter tax of one-half of one per cent. was in lieu of all other taxes against the capital stock of said bank as well as against the stockholders upon their shares of stock, and that the capital stock of said bank was not liable to the assessment which has been made, nor for the license or privilege tax asserted against it.

That the suit in which said judgment was rendered was in the name of the State for the use of the City of Memphis, is of no moment.

The city was the real party and is as much concluded as if the suit had been prosecuted directly by it. New Orleans *v.* Citizens' Bank, 161 U. S. 371, 388; Scotland County *v.* Hill, 112 U. S. 183.

We come then to the question of the efficacy of the judgment in the prior case as adjudging conclusively that an exemption exists which extends to the capital stock of the complainant bank. The city taxes involved in the prior case were those assessed upon complainant's capital stock by the City of Memphis for the years 1888 to 1891, inclusive.

51 The taxes involved in the present case are taxes assessed by the same municipality and upon the same capital stock for the year 1899.

The cause of action in the two cases is, therefore, not the same, inasmuch as the demand in the adjudged case was taxes of certain years other than the years involved in this suit.

But the question of exemption of the capital stock from taxation other than that stipulated in the charter was necessarily presented

and determined adversely to the claim of the City of Memphis, upon identically the same facts upon which the right of exemption is now claimed.

Under the decisions of the Supreme Court of the United States, the mere fact that the present demand is for a tax for one year, and the demand in the adjudged case was for taxes for other and antecedent years, "does not prevent the operation of the thing adjudged." New Orleans *v.* Citizens' Bank, 167 U. S. 371, 396, 398; Southern Pacific R. R. *v.* U. S., 168 U. S. 1, 52; New Orleans *v.* Citizens' Bank.

In New Orleans *v.* Citizens' Bank, the court said:

"The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has, under identical circumstances and conditions, been previously concluded by a judgment between the parties or their privies."

"This," said the court, "is the elemental rule, stated in the text books and enforced by many decisions of this court."

Among the cases cited as supporting this principle are the cases of Bank *v.* Beverly, 1 How. 134, 139; Cromwell *v.* Sac County, 94 U. S. 351, 353; and Last Chance Mining Company *v.* Tyler Mining Company, 157 U. S. 683, and the case of Heroman *et al. v.* Louisiana, 34 La. An. 805, 814.

This well-settled rule was applied in a case in which the controversy was as to the efficacy of prior judgments upon demands for taxes for years other than those involved in that case, which judgments had been rendered in local courts of the State of Louisiana. In that case it was also contended that public policy forbade the application of the principle stated to controversies as to taxation. After saying that this argument, if meritorious, should be addressed to the law-making and not to the judicial department, Mr. Justice White said, that "it was without real merit." "In its ulti-
52 mate aspect it asserts that no question concerning Government or public authority ought ever to be submitted to judicial investigation. Indeed, the contention is that there is no power in courts of justice to consider any question of taxation or render any judgment in relation thereto. That this is the result of the proposition is manifest from the fact that the very essence of judicial power is that when a matter is once ascertained and determined it is forever concluded when it arises again under the same circumstances and conditions between parties or their privies. To admit the judicial power on the one hand, and to deny on the other the very substance and essence of such power, is not only contradictory, but destructive of the fundamental conceptions upon which our system of government is based. Under this theory the cause under consideration should not be entertained, but should be dismissed. Accepting the argument in its full consequence, every judgment rendered by this court from the foundation of the Government, declaring a particular tax or burden unconstitutional, imparts no efficacy whatever. Every decree of this court enforcing taxation in order to discharge obligations previously contracted, where the right

to the tax was a part of the obligation, is deprived of the sanctity of the thing adjudged, for manifestly if the estoppel of the thing adjudged does not arise from a judgment preventing taxation, such an estoppel cannot also result from a judgment enforcing taxation."

But the defendants say, that whatever the efficacy of such a judgment ordinarily the judgment plead in bar and as a conclusive adjudication of the question of exemption here involved, is a judgment of the supreme court of Tennessee, and that under the well-settled rule of that court a judgment in a tax case is not conclusive between the parties except as to the particular taxes actually in litigation, and is not conclusive in respect of taxes assessed for other and subsequent years when relied upon as *res adjudicata*. State *v.* Bank of Commerce, 95 Tenn. 231; Bank *v.* Memphis, 101 Tenn. 154, 167.

The opinion of the court in that case was by Judge McAllister, who, upon this subject, said:

"We think the plea of *res adjudicata* in tax cases is to be limited to the taxes actually in litigation, and is not conclusive in respect of taxes assessed for other and subsequent years. Since this is not a Federal question, we decline to follow the ruling in New Orleans *v.* Citizens' Bank, 167 U. S. 371, in which it was held by a majority opinion that a judgment in a tax case is as conclusive of the taxes of other years as is of the taxes for the years actually involved.

53 "In State *v.* Bank of Commerce, 95 Tenn. 231, we said: 'These suits being for other years than those sued for in the Farrington case, that decision is not (as an adjudication) conclusive of the present case,' citing Cromwell *v.* County of Sac, 94 U. S. 351; Nesbett *v.* Riverside Ind. Dist., 144 U. S. 610; W. & W. R. R. *v.* Alsobrook, 146 U. S. 279; Keokuk R. R. *v.* Missouri, 152 U. S. 301. We adhere to that ruling."

The effect of the judgment in Bank *v.* Memphis as *res adjudicata* in avoiding the efficacy of the prior judgment now relied upon as *res adjudicata*, is not now before us, inasmuch as that judgment has not been plead or proven, the present hearing being upon a demurrer to the bill of complainant which does not set out the judgment in the case referred to. Turley *v.* Turley, 85 Tenn. 252, 261; Jourolmon *v.* Massengill, 86 Tenn. 81; Daniels Eq. Pl. 659, 661; United States *v.* Bliss, 172 U. S. 321; Bryan *v.* Campbell, 177 U. S. 649; Freeman on Judgments, sections 283, 332.

The case comes to this: The complainant pleads a judgment as conclusively establishing that a charter exemption exists giving it immunity from the tax here involved which judgment has no force or effect in the court which rendered it other than as a bar to another suit for the same identical taxes then in litigation, and which, under the law and usage of that State "is not conclusive in respect of taxes assessed for other and subsequent years."

The exemption from the ad valorem taxation of its capital stock claimed in this suit exists only, if it exists at all, by reason of the conclusive character of the thing adjudged in the prior case. But if that judgment would not be conclusive in respect to taxes for other

years in the courts of the jurisdiction in which it was pronounced upon what principle does it become of any greater efficacy when relied upon as *res adjudicata* in the courts of another jurisdiction?

By the law of England as it existed when the separation from our mother country occurred, foreign judgments were only *prima facie* evidence upon the merits of the matter in litigation, and when relied upon in the courts of England were subject to re-examination not only as to the jurisdiction of the court, but upon the merits. By the law of this country, a money judgment, rendered by a court of a foreign country having jurisdiction of the parties and the cause, in a suit brought by one of its citizens against one of ours, is only *prima facie* evidence and not conclusive, in an action brought here upon the judgment, when by the law of the foreign country
54 judgments of American courts are not recognized as conclusive. Hilton *v.* Guyot, 159 U. S. 113.

But such a judgment is conclusive, when sued upon here, as to all matters therein pleaded, and which might have been tried in the foreign court, if it be the judgment of a foreign jurisdiction, which, under like circumstances, regards the judgments of our courts as conclusive. Richie *v.* McMullen, 159 U. S. 235.

"Before the American Revolution," says Mr. Justice Gray, in the great opinion delivered by him for the court in Hilton *v.* Guyot, 159 U. S. 113, 181, "all the courts of the several colonies and States were deemed foreign to each other, and consequently, judgments rendered by any one of them were considered as foreign judgments, and their merits re-examinable in another colony, not only as to the jurisdiction of the court which pronounced them, but also as to the merits of the controversy, to the extent to which they were understood to be re-examinable in England."

"It was because of that condition of the law, as between the American colonies and States, that the United States at the very beginning of their existence as a nation, ordained that full faith and credit should be given to the judgments of one of the States of the Union in the courts of another of those States."

By section 1 of article 4 of the Constitution of the United States it is accordingly provided that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State; and the Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be, and the effect thereof."

Under this power, the Congress did, at an early day, provide, not only for the mode of authenticating the records and proceedings of the courts of any State, but enacted, "that the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usages in the courts of the State from whence the said records are or shall be taken." Revised Statutes, section 905.

Judgments rendered in one State of the Union, when proved in the courts of another, differ from judgments recovered in a foreign country only in respect to their conclusiveness upon the merits, if

rendered by a court having jurisdiction over the parties and the cause of action, and this difference is wholly due to the constitutional and legislative provision already cited. Mills *v.* Duryea, 7 Cranch, 481, 484, 485; D'Arcey *v.* Ketchum, 11 How. 165, 175, 176; Hanley *v.* Donoghue, 116 U. S. 1, 4.

55 In Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 292, it was said:

"Judgments recovered in one State of the Union, when proved in the courts of another government, whether State or national, within the United States differ from judgments recovered in a foreign country in no other respect than in not being re-examinable on their merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties."

In Hilton *v.* Guyot, 159 U. S. 113, 189, it was said, that "the decisions of this court have clearly recognized that judgments of a foreign State are *prima facie* evidence only, and that but for these constitutional and legislative provisions, judgments of a State of the Union, when sued upon in another State, would have no greater effect."

The statutory provision, section 905, extends to every court, "within the United States," and, therefore, to courts of the United States, and such courts are, therefore, bound to give to judgments of State courts the same faith and credit which the courts of another State are bound to accord to them. Kansas City, etc., R'd Co. *v.* Morgan, 21 C. C. A. 468; Pennoyer *v.* Neff, 95 U. S. 714, 733; Freeman on Judgments, sec. 575.

Neither the constitutional nor legislative provision referred to, requires that any such judgment when proven in a court of the United States or of another State shall be given any greater efficacy or degree of conclusiveness than it has by the "law or usage" of the State from which it comes. The plain provision of the statute is, that such judgments "shall have such faith and credit given to them in every court within the United States *as they have by law or usage in the courts of the State from whence the said records are or shall be taken.*"

Nor does any principle of general law or natural justice demand that any greater efficacy shall be accorded to a judgment of any State or foreign country, when either sued upon or plead as *res adjudicata* in the courts of another jurisdiction, than is accorded to it by the law or usage of the State or country from which the judgment comes.

If such judgment be given the effect and conclusiveness accorded to it at home, every demand of the positive law as well as of justice has been answered.

To give it any greater efficacy than it has in the State or country in which it was rendered would be in opposition to every principle of international law and contrary to principles of moral justice.

56 Those defenses which might be made to it at home and those only can be made in any other jurisdiction where it is sued upon or plead in bar. These principles find support in the utterances of a multitude of judges, though in none of the cases

cited, does the precise question here at issue seem to have arisen. Chicago and Alton R. *v.* Wiggins Ferry Co., 108 U. S. 18, 20; Chase *v.* Curtis, 113 U. S. 452, 460; Suydam *v.* Barber, 18 N. Y. 468, 472; Renaud *v.* Abbott, 116 U. S. 277, 287; Hanley *v.* Donoghue, 116 U. S. 1; Candee *v.* Clark, 2 Mich. Rep. 257; Armstrong *v.* Carson, 2 Dallas, 302; Miles *v.* Caldwell, 2 Wall. 35; Green *v.* Sarmiento, 3 Wash. C. C. R. 17; King *v.* McLean Asylum, etc., 12 C. C. A. 145, 164, 165; Wood *v.* Watkinson, 17 Conn. 500, 504, 505; Baugh *v.* Baugh, 4 Bibb (Ky.) 556; Sweet *v.* Brockley, 53 Maine 346; Milan *v* Fitz James, 1 Bos. & Pul. 138; Smith *v.* Nichols, 5 Bing. N. C. 208; Embry *v.* Palmer, 107 U. S. 3, 10; Poorman *v.* Crone, Wright's Rep. 347; Freeman on Judgments, section 575; Wells *Res Adjudicata*, sec. 531; Bates Federal Eq. Practice, section 424.

In Chicago and Alton Railroad Co. *v.* Wiggins Ferry Co., cited above, speaking of the effect to be attached to the judgment of the State of Missouri, construing a law of another State, the court said:

"So long as the judgment stands, it cannot be impeached collaterally in the courts of the United States any more than in those of the State, by showing that if due effect had been given to the laws it would have been the other way. If it has the effect of an estoppel, as is claimed, it will continue to have that effect until reversed or set aside in some appropriate form of proceeding instituted directly for that purpose. The courts of the United States must give it the same effect as a judgment that it has in the courts of the State. Whether, as a judgment, it operates as an estoppel, does not depend on the Constitution or laws of the United States, but on the effect of a judgment under the laws of Missouri."

In Suydam *v.* Barber, 18 N. Y. 468, 472, the suit was against the members of a firm upon a partnership obligation. One of the partners defended upon the ground that the plaintiffs had brought an action against another of the partners alone, in a court of Missouri and recovered judgment. This Missouri judgment was plead as operating as an extinguishment of the liability of the other partners.

According to the common law, which prevailed in New York, a judgment against one of several joint debtors, obtained in an action against him alone, was a bar to an action against the others.
57 But it was shown that all contracts which by the common law were joint only, were by the law of Missouri joint and several, and that the effect of a judgment against one thus jointly and severally liable was not to extinguish the obligation or discharge the liability of others.

The New York court held the judgment inoperative as a bar, and, among other things, said:

"The consequences of a judgment, in respect to its effect as a merger or extinguishment of the original demand, are a part of the law under which the judgment itself is rendered, just as much as are those other common consequences of judgments, that a party may have execution upon them and that they are not re-examinable on the merits of the controversy determined by them.

"In all these particulars, the effect of a judgment, in the government where it is rendered, is the subject of positive regulation by

that government, just as it is the subject of positive regulation by what process and what courts judgments shall be rendered at all."

Referring to the effect of judgments of one State when plead in another under the constitutional and legislative provisions in respect to the faith and credit to be given to such judgments by the courts of the United States and of other States, the court said:

"While the rule just stated as to the effect of judgments of one State in the courts of another is clear, as is established by the cases cited by Judge Cowen, and by numerous others, yet no case can be found where a greater effect is given to the judgment of any State in the courts of another than belongs to it in the State where it was rendered. Indeed, such a rule would be against all reason, and not only out of the policy of the provisions of the Constitution and laws of the United States on that subject, but against and irreconcilable with all policy and with the plainest and fundamental principles of justice."

Finding that under the law of Missouri the effect of the judgment was not to extinguish the obligation sued upon or discharge the other persons liable, it was held, that no greater effect should be given to such a judgment when relied upon as a bar to a suit against the other parties liable upon the original contract.

In Wood *v.* Watkinson, cited above, the Connecticut court said:

"Taking it for granted, that when a judgment in the court of a sovereign State, or one of the States of this Union, is sought to be enforced in another State than that in which it was rendered, there is no objection to its validity on the ground of a want of juris-
58 diction in that court, it is well settled that no greater effect is to be given to it than it would have in the State where it was rendered. It has no higher dignity in any other State than in the one where it was pronounced; and hence, if in the courts of the State where the judgment was rendered, it is inconclusive, or if it is inquirable into there, during a particular period, or on certain conditions, it will be open to investigation, to the same extent, everywhere else. Armstrong *v.* Carson's Ex'rs, 2 Dall. 302; Green *v.* Sarmiento, 1 Pet. C. C. Rep. 74; Spencer *v.* Sloo, 8 Lou. R. 290; Curtis *v.* Gibbs, 1 Pennington's R. 399; Baugh *v.* Baugh, 4 Bibb, 556; Rogers *v.* Coleman & *ux.*, 1 Hardin's R. 413, 420; Smith *v.* Nicolls, 5 Bing. N. C. 208; (35 E. C. L. 88).

"So, if a judgment operates in the State where it was rendered only *in rem*, it will not elsewhere be enforced *in personam*. It results conclusively from this principle, or is rather involved in it, that if a judgment in a State where it is recovered, has not the effect of binding personally the defendants, or any of them, in the suit in which it was rendered, no greater effect will be given to it in any other State where it is endeavored to be enforced. It derives its obligation only from the laws of the State in which it is pronounced. A judgment creates a debt, on the ground that a liability is ascertained and established, by the decision of a tribunal, which might rightfully adjudicate upon it; and such adjudication derives its whole force and effect from the laws of the State under whose authority it is made." * * *

That court added:

"There is nothing in our national Constitution on this subject, which, according to any construction which has ever been claimed for it, gives the judgment of one of the States, when sought to be enforced in another, a greater effect than it would have in the State where it was rendered."

There is nothing which precludes this court from determining for itself whether the charter exemption claimed exists to the extent of granting to the appellant immunity from the ad valorem taxes assessed against its capital stock by the defendant, The City of Memphis, except the supposed conclusive effect of the thing adjudged in the prior case which is relied upon as settling the question without looking into the terms of the contractual exemption.

Finding, as we do, that the judgment in the prior case is not, under the law of Tennessee, conclusive when the second suit is a demand for taxes of other years, subsequently assessed, and that in the courts of that State neither party could plead that judgment as a bar to a suit for taxes for other years, we are, therefore, not precluded from looking into the charter. The opinion of the
59 Supreme Court of the United States in the two cases of Bank of Commerce *v.* Tennessee, 161 U. S. 134, and Shelby County *v.* Union and Planters' Bank, 161 U. S. 149, are binding authorities upon us and require that we shall hold that the capital stock of the appellant bank is not exempt from ad valorem taxation by reason of the charter exemption claimed by the Union and Planters' bank.

The demurrers which raise the question we have discussed were properly sustained and the decree dismissing the bill is accordingly affirmed.

60 And afterwards to wit on December 16th 1901 an order was entered in said cause which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

UNION & PLANTERS' BANK
vs.
CITY OF MEMPHIS.

Appeal to the Supreme Court in this case is allowed and bond fixed at $500.

And on the same day to wit on December 16th 1901, a petition for appeal was filed clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

UNION & PLANTERS' BANK, Appellant,
vs.
THE CITY OF MEMPHIS, Appellee. } #924.

Appealed from the circuit court of the United States for the western district of Tennessee.

The petitioner, the above-named appellant, The Union & Planters' Bank of Memphis, Tennessee, respectfully states and shows to the court that herein a decree was rendered in favor of the re-
61 spondents and against it, as by an inspection of the record will appear, on the 21st of October last, wherein this court adjudged and decreed that the decree of the circuit court of the United States for the western district of Tennessee in this cause be and the same is affirmed, with costs.

And petitioner avers that in the proceedings in this cause it affirmed, among other things, that the tax laws set forth in the pleadings, impaired the obligation of its charter provision in these words:—"That said company shall pay to the State of Tennessee, an annual tax of one-half of one per cent. on each share of capital stock subscribed, which shall be in lieu of all other taxes," and that its capital stock was exempt under the charter provision aforesaid, from the taxes sought to be collected by the judgment of the supreme court of the State of Tennessee upon a judgment and decree set forth and relied on in the pleadings, upon identically the same state of facts and between the same parties.

And petitioner shows to the court that by the judgment and decree herein entered, this court denied the propositions of the appellant to be well founded in law, and affirmed by its decree that the aforesaid clause of its charter did not contractually exempt it from the payment of the taxes specified, and also affirmed that the judgment, of the supreme court relied on must be limited to the taxes that were in suit between the parties hereto in the previous litigation, and the estoppal of that judgment did not extend to and embrace taxes of other years, though the taxes were upon the same subject-matter of taxation, and did thereby affirm that the revenue laws of Tennessee set forth in the pleadings imposing taxes upon the capital stock of the appellant, did not impair the obligation of the contract as above set forth, which the appellant affirmed and the respondent denied.

62 Wherefore, the appellant prays that it be granted an appeal to the Supreme Court of the United States, conformably to the practice of the court in such cases made and provided, upon its entering into a bond conditioned as the law requires.

UNION & PLANTERS' BANK.
G. R. READ, *Pres't.*
WM. H. CARROLL,
TIM. E. COOPER,
Att'ys for Petitioner.

And on the same day to wit on December 16th 1901, assignments of error were filed which read and are as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

UNION & PLANTERS' BANK, Appellant,
vs.
THE CITY OF MEMPHIS, Appellee. } #924.

Comes the appellant and says that in the record and proceedings in the above-entitled cause and court, there is manifest error, and it assigns as error to the decree of the court herein, entered on the 21st of October 1901;

1.

The holding by the court that the tax laws set forth in the pleadings, did not impair the contract between the appellant and the State of Tennessee, by which the appellant claimed an exemption from taxation under a provision in its said charter, as follows: "That the said company shall pay to the State of Tennessee, an annual tax of one-half of one per cent. on each share of capital stock subscribed, which shall be in lieu of all other taxes."

63

2.

In affirming that the former litigation between the City of Memphis and the appellant, where it was sought to enforce a municipal assessment for taxes upon its capital stock for the years 1888, 1889 and 1890, did not conclusively adjudge that the capital stock of the appellant was contractually exempt from the payment of ad valorem taxes to the City of Memphis, and did not estop the City of Memphis from affirming that the true and proper construction and meaning of the said charter was not to exempt appellant's capital stock from ad valorem taxes to the said city.

3. In affirming the judgment of the circuit court of the United States for the western district of Tennessee, sustaining the demurrers of the respondent to the merits.

Wherefore, the appellant prays that the said decree may be reversed, vacated and annulled.

WM. H. CARROLL &
TIM. E. COOPER,
Counsel for Appellant.

And afterwards on the same day to wit on December 16th 1901, proof of service of notice of appeal was filed which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

UNION & PLANTERS' BANK, Appellant,
vs.
THE CITY OF MEMPHIS, Appellee.

The defendants and their counsel, are hereby notified that we will apply at the opening of the court on Monday, December 16th
64 next, or as soon thereafter as practicable, for an appeal from the judgment and decree entered in the above-entitled cause, on the 21st of October last, when and where they can attend and oppose if they see proper, the application.

WM. H. CARROLL &
TIM. E. COOPER,
Counsel for U. & P. Bk.

Service in the above-entitled cause, of notice of an application for an appeal, acknowledged on this 5th day of Dec. 1901.

JOHN H. WATKINS,
Att'y for City of Memphis.

And afterwards to wit on December 26th 1901, bond on appeal was filed clothed in the words and figures as follows:

Bond on Appeal.

65 Bond on writ of error or appeal.

Know all men by these presents, that we, the Union and Planters' Bank of Memphis, as principal, and S. V. Read and Nolan D. Fontaine, as sureties, are held and firmly bound unto the City of Memphis in the full and just sum of five hundred dollars to be paid to the said City of Memphis certain attorneys, executors, administrators or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators jointly and severally, by these presents.

Sealed with our seals and dated this 21st day of December in the year of our Lord one thousand nine hundred and *ninety* one.

Whereas, lately at a session of the United States circuit court of appeals for the sixth circuit in a suit depending in said court, between Union & Planters' Bank and the City of Memphis, a decree a was rendered against the said Union & Planters' Bank and the said Union & Planters' Bank having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said —:

Now, the condition of the above obligation is such, that if the said Union & Planters' Bank shall prosecute said appeal to effect, and answer all damages and costs if it fail to make its plea good,

then the above obligation to be void; else to remain in full force and virtue.

[SEAL.] UNION & PLANTERS' BANK OF MEMPHIS, [SEAL.]
By S. V. READ, *P't.* [SEAL.]
S. V. READ. [SEAL.]
NOLAN D. FONTAINE.

Sealed and delivered in presence of—
——— ———.

Approved by—
HORACE H. LURTON, *Judge, etc.*

66 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing is a true and correct copy of the record in the case of Union & Planters' Bank of Memphis *vs.* City of Memphis No. 924, as the same remains upon the files and records of said United States circuit court of appeals for the sixth circuit, and of the whole thereof.

Seal United States Circuit Court of Appeals, Sixth Circuit.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said court, at the city of Cincinnati, Ohio, this sixth day of January A. D. 1902

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

Endorsed on cover: File No. 18,369. U. S. C. C. of appeals, 6th circuit—Term No. 221 The Union and Planters' Bank of Memphis—appellant—*vs.* The City of Memphis. Filed January 13, 1902.

8444

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

No. 279. 67

THE UNION AND PLANTERS BANK OF MEMPHIS, TENNESSEE, PLAINTIFF IN ERROR,

vs.

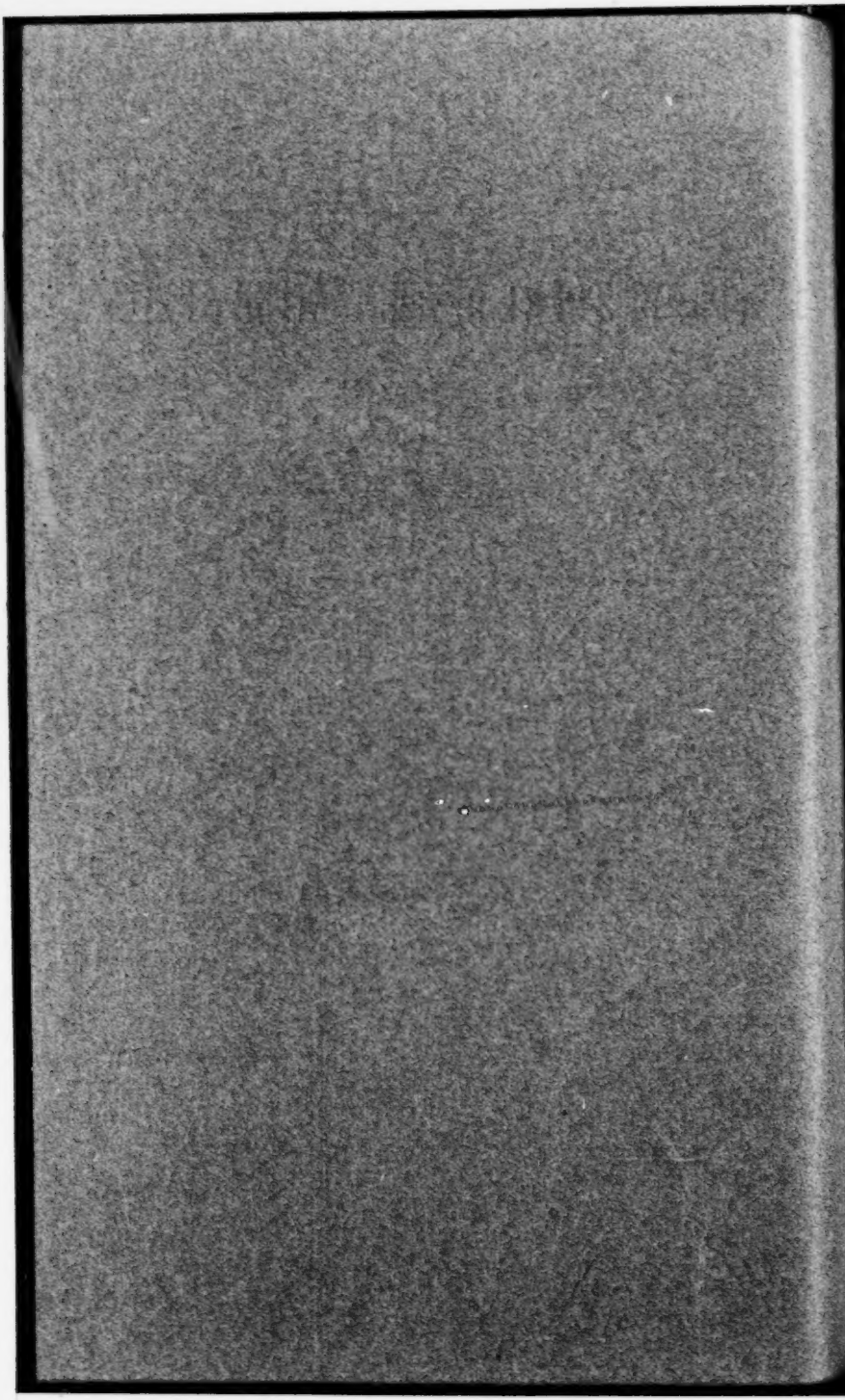
THE CITY OF MEMPHIS AND JOHN H. ALSUP, TRUSTEE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

Motion to Postpone Hearing of this Case until No. 221 is Reached.

WM. H. CARROLL,
TIM. E. COOPER,
Attorneys for Motion.

S. C. TOOF & CO., PTG. & LITHO., MEMPHIS.



In Supreme Court of the United States.

OCTOBER TERM, 1902.

UNION & PLANTERS BANK OF MEMPHIS

vs. } No. 279.

THE CITY OF MEMPHIS AND JOHN H. ALSUP, *Trustee.*

The plaintiff in error moves that the above entitled suit be heard with the case of the Union & Planters Bank of Memphis, appellant, against the City of Memphis, No. 221, which is an appeal from the United States Circuit Court of Appeals for the Sixth Circuit, because of the identical questions involved in the two records, the appeals being from a decree entered on the 6th day of November, 1900, in the same case, in the Circuit Court of the United States for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit, the one appeal being taken directly to this court and the other to the United States Circuit Court of Appeals for the Sixth Circuit, where the latter appeal came on to be heard on the 10th day of June, 1901, and was by the court decided on the 21st of October that year, from which decision the appeal in the latter case was taken to this court. All of which will appear from a transcript of the record of the two cases.

And John H. Watkins, attorney for the city of Memphis, and John H. Alsup, trustee, join in this motion and request.

WILLIAM H. CARROLL,
TIM. E. COOPER,
Attorneys for Plaintiff in Error.
JNO. H. WATKINS,
Attorney for Defendants in Error.

844

Office Supreme Court U.S.
FILED
NOV 10 1902
JAMES H. McKENNEY,
Clerk.

No. 67.

Brf. of Carroll for Appt.

Filed Nov. 10, 1902.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

UNION AND PLANTERS' BANK

vs.

67.

CITY OF MEMPHIS, ET AL.

ASSIGNMENT OF ERRORS AND ARGUMENT FOR APPELLANT.

WILLIAM H. CARROLL,
TIM E. COOPER,
Attorneys for Appellant.

Scimitar Linotype Print.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

UNION & PLANTERS' BANK, APPELLANT,

VS.

CITY OF MEMPHIS, ET AL., APPELLEES.

APPEALED FROM THE CIRCUIT COURT OF APPEALS. SIXTH CIRCUIT.

STATEMENT OF THE CASE.

The learned Judge who delivered the opinion of the Court, in the Circuit Court of Appeals, made such a clear statement of this case that we quote it. He said:

"The case is this: In 1859 the State of Tennessee, by its General Assembly, granted a charter under which the Union & Planters Bank was organized. That charter contained a provision upon the subject of taxation in these words: 'That said company shall pay to the State of Tennessee an annual tax of one-half of one per cent. on each share of stock subscribed, which shall be in lieu of all other taxes.' The complainant's bill avers that, in impairment of the obligation of the contractural exemption from every tax except that provided by the charter, the State of Tennessee has passed a law providing, among other things, for the assessment of State, county and city taxes upon the capital stock of this and all other corporations having like contractual exemptions, and that the city of Memphis, under and in pursuance of the legislation referred to, has assessed an ad valorem tax for the year 1899 upon the capital stock of the complainant bank for municipal purposes exceeding $2,000, and is about to distrain, etc. It is averred that the law under which this assessment has been made impairs the obligation of the contract by which the complainant is exempt from all taxa-

tion upon its capital stock other than that provided for in its charter. It is then averred that in a former litigation between this complainant and the city of Memphis, where it was sought to enforce a municipal assessment of taxes upon complainant's capital stock for the years 1888, 1889 and 1890, it was solemnly adjudged and decided that under the charter provision aforesaid the capital stock of said corporation was exempt from all general taxation. The record in the said suit and the judgment therein rendered—being a judgment of the Supreme Court of Tennessee—is set out in full, and pleaded and relied upon as an adjudication estopping the said city of Memphis from bringing the validity of the true and proper construction and meaning of said provision again into controversy. The bill is most specific in averring that the judgment so pleaded and set out as establishing the exemption of its said capital stock from taxation was based upon the identical claim of exemption now asserted by it in order to defeat the taxes now in question, and that 'the judgment and decree aforesaid adjudged its claim to exemption upon the identical same facts and conditions' as those appearing herein. Upon this former judgment between the same parties, and upon the same facts and issues, the complainant bank avers and contends that the question of the right of the city of Memphis to assess its capital stock 'has been finally judicially determined not to exist, because of the judicial construction put upon its exemption in the suit to determine that question between it and the said city of Memphis.' The defendant filed a demurrer assigning no less than twelve reasons why the complainant's bill should not be sustained. This demurrer was sustained, and the bill dismissed."

Upon the question of the jurisdiction of the Court and the equitable jurisdiction of the Court, the Circuit Court of Appeals held the assignments of demurrer not well taken, upon the merits—

First—That the capital stock of the complainant company was not contractually exempt from taxation; and,

Second—That the judgment pleaded as a bar to the assessment and collection of municipal taxes upon the capital stock of the appellant by the city of Memphis, was not res adjudicata by the decisions of the Supreme Court of Tennessee, because the tax complained of was assessed for a different year and the effect of a judgment in a tax case in Tennessee, when plead as an estoppel, is to limit it as res adjudicata of the par-

ticular tax actually in litigation in the prior suit, and not to extend it to subsequent taxes.

ASSIGNMENTS OF ERROR.

The appellant assigns as error:

I.

That the decision of the Circuit Court of Appeals is erroneous, in that it held that the provision in the charter of the bank, requiring the bank to pay to the State of Tennessee an annual tax of one-half of 1 per cent. on each share of stock subscribed, which shall be in lieu of all other taxes, does not exempt the bank from ad valorem taxes on its capital stock, but applies only to stock in the hands of the shareholders.

II.

In that it held the principle of res adjudicata was to be limited, and limited it in its application in this suit, to the taxes that were actually in litigation in the prior suit, and thereby denied appellant to the benefit of a former judgment construing its contractnal exemption.

1. Considering these assignments of error in the order stated, it is to be noted that this class of cases in the Supreme Court of Tennessee, and in this Court, evidences that from the first to the last one, the dicta of the Judge delivering the opinion of the Court, has been misconceived by the Judge delivering a subsequent opinion, until it is a subject of regret, expressed in several of the opinions, that the dicta have occurred at all in the course of the delivery of an opinion.

The learned Circuit Judge who delivered the opinion herein, in conclusion, said:

> "The opinion of the Supreme Court of the United States in the two cases of the Bank of Commerce vs. Tennessee, 161 U. S., 124, and Shelby County vs. the Union & Planters' Bank (161 U. S., 149), are binding authorities upon us, and require that we shall hold that the capital stock of the appellant bank is not exempt from ad valorem taxation by reason of the charter exemption claimed by the Union & Plnaters' Bank."

If it were not for the fact, that the Judges of the Supreme Court of Tennessee have persistently affirmed, from the first to the last reported case, prior to the above decisions of the Su-

preme Court of the United States, that the charter exemption protected the capital stock from ad valorem taxes, and this court has never had that precise question before it, we would hesitate to ask the Court to review the two decisions that have controlled the Supreme Court of Tennessee and the Circuit Court of Apppeals for the Sixth Circuit.

In the course of the opinion which he delivered in the case where the judgment was entered, now relied on as res adjudicata, Judge Caldwell, speaking for the Supreme Court of Tennessee, said:

> "Since the decision in the Farrington case by the Supreme Court of the United States, this court has uniformly adhered to its previous holding, that no ad valorem tax can lawfully be laid on the capital stock, and, in recognition of that decision, has gone further, and said that shares of stock are likewise exempt from other taxation than that prescribed in the charter." Bank vs. McGowan, 6 Lea, 705; State vs. Butler, 13 Lea, 406; Id., 86 Tenn., 633; 8 S. W., 586.

Continuing, the learned Judge said:

> "Considering the decisions of the Supreme Court of the United States in Farrington vs. Tennessee, 95 U. S., 679, 24 L. Ed., 558, and in Bank of Commerce vs. Tennessee, 104 U. S., 493, 26 L. Ed., 810, together, and giving them the controlling weight to which they are entitled, it cannot be held otherwise than that the charter tax of one-half of 1 per cent. is in lieu of all other taxes, whether against the bank on its capital stock or against owners on shares of stock. Under the construction there given, the charter exemption includes both. As an original question, we would hold as held by this Court in City of Memphis vs. Farrington, 8 Baxt., 539, and charge the stockholders with an ad valorem tax; but, upon authority, we hold as stated above. This Court has never decided, and in the absence of the ruling of the Supreme Court of the United States in Farrington vs. Tennessee, 95 U. S., 679, 24 L. Ed., 558, would not now decide, that the charter gives the owners of shares of stock any immunity or exemption from taxation on the shares. That question is now adjudged along upon the authority of that case. It did not arise and was not adjudged in Bank vs. McGowan, 6 Lea, 705, in State vs. Butler, 13 Lea, 406, or in Id., 86 Tenn., 633, 8 S. W., 586. Complainant seeks in addition to what has already been stated, to recover from the bank $1,800 as privilege taxes for the years 1889, 1890 and 1891. These taxes are claimed from the corporation for the right of exercising its franchises,

for the privilege of doing a banking business. Manifestly the charter tax was intended to cover this right or privilege. The language of the charter tax implies that in consideration of the public good and the payment of the tax therein specified, the State will allow the corporation to exercise the franchises granted without further taxation. City of Memphis vs. Hernando Ins. Co., 6 Baxt., 527; Union Bank of Tennessee vs. State, 9 Yerg., 490. The case of New Orleans C. & L. R. Co. vs. City of New Orleans, 143 U. S., 192, 12 Sup. Ct., 406, 36 L. Ed., 121, is not, as we understand it, an authority against this ruling. There the contract afforded no evidence of an intention to exempt the corporation from license or privilege tax. 143 U. S., 195, 12 Sup. Ct., 406, 36 L. Ed., 122. Here the intention to do so is clear and unmistakable. The charter tax was imposed primarily as a consideration for the corporate franchises and the right to exercise them. No other reasonable construction can be placed upon the words of the charter. The State is bound by its contract; and so, likewise, is the city of Memphis, which is but an arm or agency of the State government. This is true not only as to privilege taxes, but also with respect to the other taxes claimed in this case. All subjects of taxation covered by the charter tax are exempt from further assessment, whether made in behalf of the State, county or municipality. As to those subjects, the specified tax is in lieu of all the other taxes—State, county and municipal. Such is the undoubted meaning of the contract. City of Memphis vs. Hernando Ins. Co., 6 Baxt., 527; Union Bank of Tennessee vs. State, 9 Yerg., 490; City of Nashville vs. Thomas, 5 Cold., 600."

After this decision the case of Shelby County vs. the Union and Planters' Bank, supra, was handed down in the Supreme Court of the United States. In that case the charter exemption of the appellant was construed not to include the capital or surplus and undivided profits, and as limited to other taxes on shares of stock only.

In the last cited case, this Court, speaking by Mr. Justice Peckham, said, that the clause in the charter did not apply, or cover the case of the capital stock of the appellant, or its surplus and accumulated profits, and upon the latter subject so adjudged, after a consideration of the cases relied on. It would be inexcusable to ask this Court to again consider the construction of the exemption of appellant if it were not for the fact that for a period of a quarter of a century, there has been an opinion radically different on that subject as to the true con-

struction of the clause under consideration. The learned Justice, in the course of his opinion in Union, etc., Bank vs. Memphis, said:

"We do not admit the claim made by the counsel for the appellee that the Farrington case must have decided the exemption of the stock of the corporation, because in the case of Wicks against the State of Tennessee, mentioned in a note to the Farrington case, at page 690, as is claimed, the exemption was of the capital stock of the corporation, which was held, nevertheless, to come within the principle of the main case decided. There was no material difference in the meaning of the exemption clause in the various cases mentioned in the note to the Farrington case."

In the former argument, as in this, the contention was, and is that the charter tax was a special and discriminating rate of taxation, measured by, in the one instance, the shares of stock subscribed, in another, by the shares of stock paid in, and in a third, upon the amount of the capital stock actually paid in. It was from thtis last premise that the conclusion followed that the exemption was broader in its scope than the subject selected upon which to fix the special and discriminating rate of taxation in each charter.

If the premise is a correct one, this Court undoubtedly so held, in the case of Hill against the State, construing the charter exemption, for the discriminating tax was laid upon the amount of the capital stock actually paid in, and it exempted from taxation the shares owned by Mr. Hill. The exemption was expressed in these words: "Which shall be in lieu of all other taxes and assessments." The clause in the charter is as follows: "Be it further enacted, there shall be levied a State tax of one-half of 1 per cent. upon the amount of capital stock actually paid in, to be collected in the same way and at the same time as other taxes are by law collected, and which shall be in lieu of all other taxes and assessments."

That there is a clear distinction between shares of stock and capital stock needs only suggestion. As stated by this Court, in the case of Shelby County against the Union Bank, etc., "this is no new doctrine, and the distinction between the two properties was considered by the Supreme Court of Tennessee as long ago as in the case of the Union Bank against the State.—9 Yerger, 490, decided in 1836.

For sixty years that has been a thoroughly understood question in Tennessee. Therefore, when the question of the scope of the exemption is to be considered, to ascertain its intent and purpose, we may not only look to its language, but to the history and circumstances preceding and surrounding the grant of this charter, and kindred ones.

It was perfectly understood, since Judge Turley's opinion in the Union Bank against the State, that a special and discriminating tax, by which a corporation was to pay annually one-half of one per cent. on the amount of capital stock paid in by the stockholders, other than the State, was a contract, and that any law or constitutional amendment, imposing an additional tax upon the capital stock, would impair its obligation, and also that it did not exempt from taxation any property of the Bank not necessarily included in its capital stock, or essential to the exercise of the privileges granted. This decision was without shadow of turning until this court handed down the opinion in the Bank Cases reported in 161 U. S.

In the light of the Union Bank against the State, these charters were passed, and the various provisions contained in the several exemption clauses, were surplusage, unless the meaning was broad enough to apply to and cover taxes, other and different taxes than upon the subject matter upon which was laid a special and discriminating tax annually to be paid.

The Supreme Court of Tennessee, with the question before it for judgment and decision, held that the charter tax in Memphis against the Memphis City Bank, 7 Pickle, 574-575, decided in 1892, was laid upon the capital stock, and it therefore affirmed that the shares of stock were subject to taxation.

In Memphis City Bank vs. Tennessee, 161 U. S., 196, Mr. Justice Peckham said: "We do not think that the plea of res adjudicata can be upheld upon the facts as stated. The former judgment was entered in an action commenced long prior to the Act of 1887, to cover taxes, alleged to have become due while the corporation, plaintiff in error, was engaged in its original business of an Insurance Company, and the judgment was upon the right of its shareholders to be exempt from any further taxation than that provided for in the charter, while the Company was doing business as such Insurance Company."

It is to be observed that the 7th section of the charter under

consideration, provided "that there shall be levied a State tax of one-half of one per cent. upon the amount of capital stock actually paid in, to be collected in the same way and at the same time as other taxes are by law collected, which shall be in lieu of all other taxes and assessments."

In Shelby County vs. Union, etc., Bank, on page 154, this Court also said: "Those clauses were of substantially the same "import as that in the Farrington case, and they are set forth "in the dissenting opinion of Mr. Justice Strong at page 692 "of the report. The whole Court was of one opinion upon the "subject that there was no substantial difference in the extent "of the exemption contained in the several charters, although "there was some difference in their phraseology, but the ques- "tion was, as stated by Mr. Justice Strong, which of the par- "ties was to receive the benefit of the exemption, viz: was it "to be the corporation, or was it intended for the individual "stockholders?"

In the discussion of the cases, the Supreme Court of Tennessee and counsel representing the Banks have been doubtless misled by the expressions in the opinion of Mr. Justice Swayne, which clearly indicate at least that his belief, not only were the shares in the hands of the stockolders exempt from any further taxation than that imposed by the charter, but that the property of the corporation was itself exempt from any taxation other than provided for by the charter itself.

This Court, in Shelby County vs. Union, etc., Bank, supra, adjudged that the charter tax was laid upon the shares of stock in the hands of the shareholders, and the exemption from further taxation applies to the subject which was taxed under the charter, and is not of any greater scope.

It is to be noted that the charter tax is not laid upon the shares of stock, but upon the shares of stock subscribed, while in the case of the Bank of Commerce vs. Tennessee, the charter tax is laid on each share of capital stock, and in the Memphis City Bank, on the amount of capital stock actually paid in.

With the greatest respect for the utterances of this Court, we submit that there is in the charters of the three banks a substantial difference, and such a substantial difference as to show that the legislative intent was not to lay a charter tax on the same subject of taxation, but to annex a royalty or

bonus annually to be paid the State, making in the instances of the three banks, a different selection by which to measure that bonus, viz: stock subscribed, shares of stock, and capital stock paid in.

The Legislature recognized the separate and distinct character of the two properties, the capital stock and the shares thereof in the hands of the individual shareholders, and upon that subject, this Court said: "And separate property, in our opinion, is strong proof of the limitation of the exemption to the property which is taxed." See page 159.

The policy of Tennessee has never been to tax the two subjects in banks. The act of the General Assembly of 1887 followed by the Act of 1889, and by periodical revenue laws, is exceptional, in that it was specifically directed to taxing three or four corporations existing under special charters.

But if the charter tax is laid on capital stock paid in in the charter of the Memphis City Bank, surely it is not laid on the shares of stock in the hands of the shareholders. It naturally follows that as capital stock is separate property from shares of stock, and the imposition of the charter tax is upon that particular separate property, this Court in Hill vs. Tennessee when it held that Mr. Hill's shares of stock in his hands were not subject to taxation, adjudged that the limits of the exemption was not confined to the property upon which a charter tax is laid, but extends to the shares of stock of the shareholders.

The cases reported in 7 Pickle and referred to by the Court and in which judgments were rendered affirming that the exemption covered capital stock and shares of stock also, are briefly, as follows:

On the 22d of October, 1891, the State of Tennessee, for the use of the city of Memphis, filed an original bill against the Hernando Insurance Company and John S. Dunscomb, and on the 30th of Ocober, 1891, the same plaintiffs filed an original bill against the Bluff City Insurance Co. and Wm. H. Moore, and on the 22d of October ,of the same year, the same plaintiffs filed an original bill against the Union and Planters' Bank and S. P. Read. In each of these proceedings the complainants averred that by the Revenue Law of the State of Tennessee, being the 14th Section of Chapter 2 of the Acts of 1887, the capital stock of each of these three corporations was subject to

taxation, if the shareholders therein were not taxable upon their shares of stock, and in each of these proceedings the complainants in them sought to have a final and conclusive determination of the question. These three suits were brought in the Chancery Court of Shelby County. To the end that the scope of the exemption might be settled in the first two suits referred to, it was stated: "Complainant is advised that in order to put at rest all questions arising under said charter, the corporation and the shareholders should be made parties to the same suit and proceeding, and the question of the extent of the exemption determined in such suit."

In the last of the cases above referred to the question is raised as follows:

"Wherefore, complainant desires that both the corporation and the shareholders may be brought before the Court in one proceeding and that it may then be determined whether the tax is validly levied on the shares of stock in the hands of the shareholders or on the capital stock in the hands of the corporation."

In each one of these three cases, the corporations their secretaries and cashier, claimed that the charter tax was an immunity from the payment of ad valorem taxes, either on account of capital stock or shares of stock, and that this exemption was a contract between each of the corporations and the State of Tennessee, and the laws set out in the bills of complaint impaired the obligation of the contract between the State of Tennessee and each of the defendants.

The opinion distinctly adjudged that the charter provision "that said company shall pay to the State an annual tax of one-half of 1 per cent. on each share of stock subscribed, which shall be in lieu of all other taxes," was a contractual exemption of both the capital stock of the corporation and the shares of stock in the hands of the stockholders, whether ad valorem or privilege, imposed by State, county or municipality.

These decisions were made fifty-six years after Judge Turley rendered the opinion in the case of Union Bank vs. State, reported in 9 Yerger. There would have been no doubt but that the questions would have been put at rest, arising under the several charters, but for what Judge Caldwell said in regard to the decision in Farrington vs. Tennessee. If he had decided the propositions that were raised, and adjudged (as was done),

that neither the shareholders nor the corporation, were liable to taxes on shares of stock, capital stock, or franchises, and left out of his opinion the dicta contained therein, there would have been but little difficulty in determining the scope of the exemption in this case.

On the question of the exemption of the shares of stock from taxation, the Supreme Court of Tennessee adjudged that the shareholders were exempt upon the authority of the Farrington case. Upon the other subjects of taxation, that Court adjudged the bank was exempt because of the plain and manifest construction of the language contained in each of the charters under review.

Between the decision in the Farrington case and the decision of the cases reported in 7 Pickle, there was no question that could arise which involved the liability of the shareholders in these several corporations which have exemption from all other than charter taxes because there was no attempt to tax such shares of stock until the suits were instituted in the Chancery Court of Shelby County, Tennessee, in October, 1891. The question that did arise, and the one which was adjudged in Bank vs. McGowan, 6 Lea, 703, was the scope of the charter of the Bank of Commerce, which provided that it shall pay to the State an annual tax of one-half of 1 per cent. on each share of capital stock, which shall be in lieu of all other taxes, the contention being that the exemption in its scope did not apply to the capital stock, or anything the capital stock was invested in, and on the other hand, that it did apply so as to protect the capital stock, its banking house purchased with a part of the capital stock, in its entirety, and three lots that had been purchased by the bank under foreclosure proceedings to save debts due it.

The Supreme Court of Tennessee affirmed that the scope of the exemption included, to the extent of its assessed value, so much of the banking house as was used as a place of business for the bank, but that it did not apply to the residue of that lot and building, and neither did it apply to the lots bought in satisfaction of debts. This judgment was appealed to this Court to the extent of the latter part, and here the bank claimed exemption of the entire property under its charter. So the question here was, is that claim well or ill-founded.

The judgment was a divisible judgment, made so by the de-

cree of the Supreme Court of Tennessee awarding a recovery in favor of the bank and against the County Trustee, to the extent of the tax paid under protest, applicable to so much of the assessed value of the lot and building used as a banking house, and denying a right of recovery of the taxes sued for on so much of that lot not so used and also on the three lots bought to satisfy debts.

When the case came to be reviewed by this Court, the question was not separable so far as the banking house was concerned. It was either exempt or it was not exempt. If the scope of the exemption was limited to the subject upon which was laid the charter tax, viz., the shares of stock it logically followed that the banking house and no part of it, was exempt. If it was broader in its scope, then it logically followed that if it included the banking house, it was because of the exemption of the capital stock. This Court undoubtedly so considered, for Mr. Justice Field, after citing the Railroad Companies vs. Gaines, 97 L. S., 697, proceeded as follows: "But where the purposes for which a corporation may hold property is specified in connection with the exemption, the limitation of taxation designated must be held to apply only to property acquired for such purposes."

Bank vs. Tenn., 104 U. S., 493-495-496.

When the Judges of the Supreme Court of Tennessee considered the two decisions, taking what was decided in the Farrington case and in the Bank of Commerce case, it undoubtedly appeared to them that in the Farrington case it was held that the immunity from taxation extends to the shares of stock in the hands of the shareholders, and in the Bank of Commerce case, that it extends to so much of the building, the use whereof is required by the actual wants of the bank in carrying on its business. This was the apparent state of the decisions, when the Supreme Court of Tennessee had under consideration the case of Meriwether vs. Union and Planters' Bank, reported as the State vs. Butler, 13 Lea, 406.

Bearing in mind that when there had been three judgments of the Supreme Court of Tennessee, affirming that the immunity from taxation extends to shares of stock in the hands of the shareholders, the franchise and capital stock of these particular corporations, the scope of the exemption of the appellant came again to be considered, and was construed by the

Supreme Court of Tennessee, in 1884, at its April term. Mr. Justice Cook, delivering the opinion of that Court, said, on page 406: "While we are aware of the rule that where there is any doubt as to the power to assess a tax, the doubt must be resolved in favor of the power, yet considering the rule to its fullest extent, standing as this case does, we cannot see where there has been any room left for a possible doubt by the direct decisions upon the very questions involved, that the banking house necessary for and actually used in the conduct of the company, is covered by the exemption."

See DeSoto Bank vs. Memphis, 6 Baxter, 413.
Bank of Commerce vs, McGowan, 6 Lea, 703.
State vs. Butler, 13 Lea, 400-406.

This last decision was followed by the Bank of Commerce case, which is reported in 2 Pickle, 614, where it was again held that the charter of the bank providing it shall pay annually one-half of 1 per cent. on each share of its capital stock, which shall be in lieu of all other taxes, exempts from taxation all realty owned and used by the bank exclusively for banking purposes. See page 633.

It will be observed that an unbroken line of decisions, beginning with the case reported in 6 Baxter, 415, of the DeSoto Bank vs. Memphis, decided at the April term, 1873, and ending with the Bank of Commerce case, reported under the name of State vs. Butler, decided at the April term, 1888, held, that the capital stock of the appellant and other like corporations, was exempt from taxation under the clause in its charter, wherever and whenever it was used, to purchase and hold a lot of ground for its use as a place of business.

These authorities, covering a period of nineteen years, conclusively fixed and settled by judicial construction, the meaning of the charter of the appellant bank, and that construction is as much a part of the charter as the text itself.

The charter of the appellant is contained in a statute of Tennessee. It was not only settled by judicial construction, but that construction has been for years and years acquiesced in, and contract rights were acquired under that construction, for the stock of the corporation continuously changed hands upon the faith of it, and these contract rights are protected.

German Bank vs. Franklin County, 128 U. S., 526-539.
Anderson vs. Santa Anna, 116 U. S., 356.

Taking the last case decided, by which the appellant was adjudged to be a banking corporation under a special statutory charter, with an immunity from taxation upon payment of the special prescribed charter tax on its capital stock, its franchise, its banking house and its shareholders upon their shares of stock, which was at the April term, 1892, we have the statute conferring the charter settled by repeated judicial construction, and in addition an unbroken line of decisions in in Tennessee, beginning with the case of Union Bank in 9 Yerger, decided in 1836, and including the cases reported in 7 Pickle, in accord. Under the Tennessee decisions prior to the decision overruling all these cases, the principle was firmly established that when a decision had been acquiesced in for many years, it established a rule of property, and would not be disturbed.

In Talcott vs. McGavock's Lessee, 1 Yer., 277, the late Mr. Justice Catron, after quoting from the case of Matthews' Lessee vs. Simpson, 1 Tenn., 477, said: "I understand the bench, the bar, the Legislature and the community at large have acquiesced in this decision as the law for twenty years, not with dissatisfaction, but with a settled conviction that it is according to the true sense and meaning of the act of 1797, and I believe, with all possible deference to the opinion of others, it should not now be disturbed, independent of any doubts that might be entertained of its correctness."

In 1840, Judge Reese delivering the opinion of the Supreme Court of Tennessee in Smith vs. McCall's Heirs, 2 Hum., 166, referring to the above case of Talcott vs. McGavock's Lessee, said: "If we doubted, as we do not, the correctness of the judgment in that case, we should still yield to its authority. A greater evil can scarcely be imagined than an habitual fluctuation in judiciad opinions as to questions affecting the rights and regularity of the conduct of a whole community in relation to real property."

The principle for which we contend was applied in the case of the State upon the relation of Gaines vs. Whitworth, 8 Lea., 494-594 on page 611. That case, it occurs to us, is not to be differentiated from the case at bar, on the question. There it appeared that the Legislature of North Carolina by an Act of 1785, created a corporation called Davidson Academy, and by the sixth section, provided "that no lands, tenements or hered-

itaments which may be vested in the trustees for the sole use and behoof of the academy, shall be subject to any tax for the space of 99 years." Part of the land that had been vested in such trustees, was sold to Hicks Ewing & Co., who erected thereon a rolling mill. The State of Tennessee brought suit against that firm to recover the State tax claimed to be due on the land. In 1836 it was held by the Supreme Court, Judge Turley delivering the opinion, that the above exemption attached to the land and followed it into the hands of the purchasers from the trustees of the academy. This decision was acquiesced in until the Comptroller of Tennessee in 1881 filed a petition for a mandamus in the Circuit Court of Davidson County, to compel its trustee to assess and collect taxes upon the certain lots and improvements located in the city of Nashvillle, and known as the "free territory," that name being given to the academy or university lands. The trial court awarded a peremptory writ; the Supreme Cuort of Tennessee reversed that decision. The majority opinion was delivered by Thomas M. Jones, Special Judge, concurred in by Chief Justice Deadrick and John V. Wright, Special Judge.

The principal contentions in the case were, first, that the judgment in the suit of Tennessee against Hicks Ewing & Co., conclusively determined that the exemption exists as that court decided, and, second, that the decision if not res adjudicata, was binding, establishing as it did, a rule of property.

Upon the first proposition, the Court said that "When a "matter is once adjudicated, it is conclusively determined as "between the same parties and their privies, and this deter- "mination is binding as an estoppel in all actions, whether "commenced before or after the action in which the judgment "was made. Citing Freeman on Judgments. Sec., 249.

"It is undoubtedly true that the decision of the case in 9 "Yerger, is binding and conclusive upon the State in all suits "brought by the State against the same parties and their "privies, involving the same questions, and it is equally true "that the same questions raised and involved in the decision "of the suit of the State vs. Hicks Ewing, are involved in this "suit, but as the defendant or defendants in this suit, treat- "ing the Trustee as a mere formal party, and the owners of "the lot mentioned in the exhibit, as the real defendants, are "not in privity with Hicks Ewing & Co., or were parties to

"that suit, and each succeeding Court can overrule its own "decision, it follows that they cannot be relied upon, and plead "the decision in that suit in bar of this suit. Citing

5. Sneed, 105.

12. Frisk., 34.

Cooley on Constitutional Limitations, 48-49, Note I and authorities cited. See pages 610-611."

It is noticeable that the Court concedes the conclusiveness of a former judgment against the State in a tax suit where the subsequent suit is against the parties in which the judgment was pronounced, or their privies, and where the same questions were involved.

There was no variation in the decisions of the Supreme Court of Tennessee until the dictum of Judge Gillham in the case of the City of Memphis vs. Bank of Commerce, hereafter to be referred to.

But in the case of the State upon the relation of Gaines vs. Whitworth, a great question was involved. By the Act of the Legislature of the State of North Carolina, passed in 1785, an exemption from taxation for a period of 99 years was annexed to 240 acres of land then contiguous to the village of Nashville, and which subsequently became a part of the city limits. The Court, in 1836, having decided that that exemption attached to the land itself, in whosoever hands it passed, during the full period of 99 years, and the question in the Supreme Court of Tennessee in 1881, was whether that decision would be followed. The Judge delivering the opinion, thus stated the question and decided it:

"But this brings us to the consideration of the last and decisive question in the case—and that is, how far we are bound to respect that decision, or regard it as binding upon us, although we may not concur in its correctness. The case was decided in 1836. It was argued by George S. Yerger, attorney general and reporter for the State, and by Hons. W. A. Cook, E. H. Ewing and F. B. Fogg for the defendants—lawyers who at that time stood at the head of the bar in Tennessee, and it is no disparagement to the profession to say, that since that time they have had no superiors and but few equals. It was decided by a court which for many years adorned the Supreme Bench of Tennessee, and commanded the entire confidence of the profession, and of the citizens of the State. It was

an agreed case, and doubtless made up that the important questions involved in it might be finally settled. We cannot suppose that it was not ably argued, and fully and carefully investigated. The State, the county, and the city have acquisced in it for over forty years. Upon its correctness capital has sought investment in that 'territory,' and built valuable improvements thereon. The petition makes a solemn admission that since 1836, 'this decision has been treated by the professinn as settling the question that this property was exempt from taxes for the State, county and city.' It has to all intents and purposes become a rule of property, so far as a decision of the highest court in the State can make and establish that rule."

In the case of the Davidson Academy, the exemption was of the lands, tenements or hereditaments which may be vested in the Trustees of the County of Davidson, for the sole use and behoof of the academy, and for the space of 99 years. In case of the Union and Planters' Bank, the charter tax is imposed annually to be paid to the State, on each share of capital stock subscribed, expressed to be in lieu of all other taxes, and by a judicial construction of the one charter, for a space of 99 years lands that were vested in trustees for the use and behoof of the academy, remained exempt from taxes in whosoever hands those lands passed, and by a like construction, the capital stock, the franchise, and the banking house, and the shares of stock in the hands of the shareholders of the appellant bank, have been judicially construed to be within the exemption, and covered by it.

It is to be noted that the Act of North Carolina, 1785, incorporated an academy, and that the rights of every character and description that were vested in the trustees of that academy, were by an Act of the Tennessee Legislature, vested in the Trustees of Cumberland College. It is difficult to draw the line of demarcation between cases that establish a rule of property, and cases that are held not to establish a rule of property. Lands pass by deed, by devise, and descent. Membership in a banking corporation is evidenced by what are called certificates of stock, and they pass by sale and delivery, and by bequest and descent, and by gift. The right of a member of a banking corporation is to receive dividends, and to

share in the distribution of the assets upon its winding up, and the right of the corporation is to conduct its business under its charter, and to acquire and hold property thereunder, the most valuable of which is its franchise to do business.

In Leffingwell vs. Warren, 2 Black, 299, this Court said: "The construction given to a statute of a State, by the highest judicial tribunal in such State, is regarded as a part of the statute, and is as binding upon the Courts of the United States as the text." Citing:

Shelby vs. Guy, II Wheat, 351.
McCluny vs. Silliman, 3 Pet., 270.
Greene vs. Neil's Lessee, 6 Pet., 291.
Ross vs. Duval, 13 Pet., 45.
Massingall vs. Downs, I How., 767.
Nesmith vs. Sheldon, I, How., 812.
Van Rensselaer vs. Kearney, II How., 297.
Webster vs. Cooper, 14 How., 504.

Applying the principle underlying the decisions, we respectfully submit to the Court that the exemption in this case is broader than the subject upon which the charter tax is laid, because the charter tax is undoubtedly laid on each share of stock subscribed and not on each share of capital stock, and as an independent and original proposition, the construction which we contend for is plain and obvious, but when it is reinforced by a long line of decisions, acquiesced in for years and years, constituting a statutory construction based, many of them, upon the judicial utterances of this Court, the property rights that have been acquired under those constructions ought not to be disturbed, and the case of Shelby County vs. the Union and Planters' Bank, 161 U. S., ought to be differentiated to the extent of holding that the capital stock of the appellant is exempt from taxation. In the Nashville case the Court assumed that the agreed case was made that the questions might be decided; the cases reported in 7 Pickle were brought to put at rest all questions under the charters.

2. It is next assigned for error that the Circuit Court of Appeals limited the plea of res adjudicata in this suit, and thereby denied to the appellant its exemption from taxation upon its capital stock, the subject matter that was involved in the previous litigation, on the identical state of facts, and in doing so impaired the obligation of a contract between it and the State of Tennessee, and its local instrumentalities of

government, as that contract had been judiciously construed and determined in the prior suit.

It is a pleasure to discuss, or to even read an opinion handed down by Circuit Judge Lurton, because he deals with a question with great ability and fairness. If he is right in his application of the principle which he deemed controlling of this question, then it is conceded that his reasoning is sound. The learned Judge, in the course of his opinion, thus stated the question, giving in his statement the contentions before the Circuit Court of Appeals:

"But the duty of interpreting the scope and meaning of the exemption clause may be regarded as eliminated if it be true, as claimed, that the exemption exists as claimed because it has been so determined by the judgment relied upon as res adjudicata.

"On this point, in New Orleans vs. Citizens' Bank, 167 U. S., 371-387, Mr. Justice White, speaking for the Court, in a case where a charter exemption was claimed from general taxation by force of certain former judgments, said:

> "'Of course, if the judgments are the things adjudged and conclusively determined as between parties that the exemption of the bank under its charter exists, to the extent determined by the judgments, the duty in that regard of discussing the charter itself will be eliminated, since the effect of the thing adjudged will be to settle that question.'

"Passing then the interpretation of the scope of the charter exemption as an original question, and as effected by the decisions heretofore made considered as mere authorities, we come to the examination of the effect of the judgment of the Supreme Court of Tennessee pronounced in a suit wherein the present complainant and appellant, the Union and Planters' Bank, and the city of Memphis, the present defendant and appellee, were adversary parties; and in which it was adjudged and determined, that the charter tax of one-half of one per cent. was in lieu of all other taxes against the capital stock of said bank as well as against the stockholders upon their shares of stock, and that the capital stock of said bank was not liable to the assessment which had been made, nor for the license or privilege tax asserted against it.

"That the suit in which said judgment was rendered was in

the name of the State for the use of the city of Memphis, is of no moment.

"The city was the real party and is as much concluded as if the suit had been prosecuted directly by it. New Orleans vs. Citizens' Bank, 161 U. S., 371-388; Scotland County vs. Hill, 112 U. S., 183.

"We come then to the question of the efficacy of the judgment in the prior case as adjudging conclusively that an exemption exists which extends to the capital stock of the complainant bank. The city taxes involved in the prior case were those assessed upon complainant's capital stock by the city of Memphis for the years 1888 to 1891, inclusive."

The taxes involved in the present case are taxes asssessed by the same municipality and upon the same capital stock for the year 1899.

The cause of action in the two cases is, therefore, not the same, inasmuch as the demand in the adjudged case was taxes of certain years other than the years involved in this suit.

But the question of exemption of the capital stock from taxation other than that stipulated in the charter was necessarily presented and determined adversely to the claim of the city of Memphis, upon identically the same facts upon which the right of exemption is now claimed.

Under the decisions of the Supreme Court of the United States, the mere fact that the present demand is for a tax for one year, and the demand in the adjudged case was for taxes for other and antecedent years, "does not prevent the operation of the thing adjudged." New Orleans vs. Citizens' Bank, 167 U. S., 371, 396, 398; Southern Pacific R. R. vs. U. S., 168 U. S., 1, 52; New Orleans vs. Citizens' Bank.

In New Orleans vs. Citizens' Bank, the Court said:

> "The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has, under identical circumstances and conditions, been previously concluded by a judgment between the parties or their privies."

"This," said the Court, "is the elemental rule, stated in the text books and enforced by the many decisions of this court."

Among the cases cited as supporting this principle are the cases of Bank vs. Beverly, 1 How., 134, 139; Cromwell vs. Sac. County, 94 U. S., 351, 353; and Last Chance Mining Company vs. Tyler Mining Company, 157 U. S., 683, and the case of Heroman et al. vs. Louisiana, 34, La. An. 805, 814.

This well settled rule was applied in a case in which the controversy was as to the efficacy of prior judgments upon demands for taxes for years other than those involved in that case, which judgments had been rendered in local courts of the State of Louisiana. In that case it was also contended that public policy forbade the application of the principle stated to controversies as to taxation. After saying that this argument, if meritorious, should be addressed to the law making and not to the judicial department, Mr. Justice White said, that "it was without real merit." "In its ultimate aspect it asserts that no question concerning government or public authority ought ever to be submitted to judicial investigation. Indeed, the contention is that there is no power in courts of justice to consider any question of taxation or render any judgment in relation thereto. That this is the result of the proposition is manifest from the fact that the very essence of judicial power is that when a matter is once ascertained and determined it is forever concluded when it arises again under the same circumstances and conditions between parties or their privies. To admit the judicial power on the one hand, and to deny on the other the very substance and essence of such power, is not only contradictory, but destructive of the fundamental conceptions upon which our system of government is based. Under this theory the cause under consideration should not be entertained, but should be dismissed. Accepting the argument in its full consequence, every judgment rendered by this court from the foundation of the government, declaring a particular tax or burden unconstitutional, imparts no efficacy whatever. Every decree of this court enforcing taxation in order to discharge obligations previously contracted, where the right to the tax was a part of the obligation, is deprived of the sanctity of the thing adjudged, for manifestly if the estoppel of the thing adjudged does not arise from a judgment preventing taxation, such an estoppel cannot also result from a judgment enforcing taxation."

But the defendants say, that whatever the efficacy of such a judgment ordinarily the judgment plead in bar and as a conclusive adjudication of the question of exemption here involved, is a judgment of the Supreme Court of Tennessee, and that under the well settled rule of that court a judgment in a tax case is not conclusive between the parties except as to the particular taxes actually in litigation, and is not conclusive in respect of taxes assessed for other and subsequent years when relied upon as res adjudicata. State vs. Bank of Commerce, 95 Tenn., 231; Bank vs. Memphis, 101 Tenn., 154, 167.

The opinion of the court in that case was by Judge McAllister, who, upon this subject, said:

> "We think the plea of res adjudicata in tax cases is to be limited to the taxes actually in litigation, and is not conclusive in respect of taxes assessed for other and subsequent years. Since this is not a Federal question, we decline to follow the ruling in New Orleans vs. Citizens' Bank, 167 U. S., 371, in which it was held by a majority opinion that a judgment in a tax case is as conclusive of the taxes of other years as is of the taxes for the years actually involved.
>
> "In State vs. Bank of Commerce, 95 Tenn., 231, we said: 'These suits being for other years than those sued for in the Farrington case, that decision is not (as an adjudication) conclusive of the present case,' citing Cromwell vs. County of Sac., 94 U. S., 351; Nesbett vs. Riverside Ind. Dist., 144 U. S., 610; W. & W. R. R. vs Alsobrook, 146 U. S., 279; Keokuk R. R. vs. Missouri, 152, U.. S, 301. We adhere to that ruling."

The effect of the judgment in Bank vs. Memphis as res adjudicata in avoiding the efficacy of the prior judgment now relied upon as res adjudicata, is not now before us, inasmuch as that judgment has not been plead or proven, the present hearing being upon a demurrer to the bill of complainant which does not set out the judgment in the case referred to. Turley vs. Turley, 85 Tenn., 252, 261; Jourolmon vs. Massengill, 86 Tenn., 81; Daniels Eq. Pl., 659, 661; United States vs. Bliss, 172 U. S., 321; Bryan vs. Campbell, 177 U. S., 469; Freeman on Judgments, Sections 283, 332.

The case comes to this: The complainant pleads a judgment as conclusively establishing that a charter exemption exists giving it immunity from the tax here involved, which

judgment has no force or effect in the court which rendered it other than as a bar to another suit for the same identical taxes then in litigation, and which, under the law and usage of that State "is not conclusive in respect of taxes assessed for other and subsequent years."

After the statement thus made, the opinion of Circuit Judge Lurton reviews the authorities deemed in point, and thereupon declined to give any effect whatever to the judgment of the Supreme Court of the State of Tennessee, pleaded as an estoppel, in so far as that judgment judicially and conclusively determined the scope of the exemption in the charter of the appellant, to the extent of an immunity from taxes on its capital stock.

The first inquiry is, did the Circuit Court of Appeals give to this judgment, pleaded as an estoppel, such faith and credit as the Revised Statutes of the United States requires to be given to judgments, viz., "as they have by law or usage in the courts of the State from whence the said records are, or shall be taken?"

In the Bank of Ky. vs. Stone, 88 Fed., 383-397, affirmed by this Court, it was suggested that a subsequent decision of the Kentucky Court of Appeals in the Deposit Bank vs. Davies County, 39 S. W., 1030, had overruled the Bank Tax Cases reported in 97 Ky., 590, and thereby ousted the Circuit Court from jurisdiction, because it made the case turn on the question which did not arise under the laws and Constitution of the United States.

In disposing of the contention, Judge Taft says:

> "We cannot assent to this suggesion. The complainant asserts that it has a contract with the Commonwealth in respect to taxation, the obligation of which the city of Louisville, the city of Frankfort and the county of Franklin, by the enforcement of a subsequent law of the State, are seeking to impair. The defendants deny the existence of such a contract, and we must determine whether, as between the parties, such a contract exists. It appears that, as between the complainant and defendants, it has been conclusively adjudicated that such a contract exists. This relieves the Court from re-examining that question as an original one between the present parties; but it does not free the Court from the obligation to enforce the Constitution of the United States, in favor of the complainant, by enjoining the enforcement of a law which will impair

the obligation of a contract thus conclusively established. The case of the City of New Orleans vs. Citizens' Bank of Louisiana, 167 U. S., 371, 17 Sup. Ct., 527, which presented precisely this aspect, was begun in the Circuit Court of the United States, and was carried to the Supreme Court of the United States, and the jurisdiction by the Circuit Court was not even questioned.

"It is argued that the Federal Courts, in considering the question whether a State law impairs the obligation of a contract, will not accept as conclusive the construction which the Supreme Court of the State has put upon its Constitution or laws in determining the existence of a contract and its violation. This is true, and is settled by a long line of authorities. Shelby Co. vs. Union and Planters' Bank, 161 U. S., 149, 16 Sup. Ct., 558; Mobile & O. R. R. vs. Tennessee, 153 U. S., 492, 493, 14 Sup. Ct., 968; Bryan vs. Board, 151 U. S., 650, 14 Sup. Ct., 465; Railroad Co. vs. Palmes, 109 U. S., 256, 3 Sup. Ct., 193; Douglas vs. Kentucky, 168 U. S., 488, 502, 18 Sup. Ct., 199, and cases cited. But the rule has application only where the judgment of the State Court is under direct review, or in cases in which the opinion of the State Court is cited merely as an authority and a precedent. It has no application to a case in which a prior judgment of the State Court between the same parties, is pleaded or is offered in evidence in a subsequent suit in a Federal Court as res adjudicata binding the parties. The State Court is as much bound by the Constitution of the United States as a Federal Court, and is vested with as complete jurisdiction in causes otherwise within cognizance to decide, between the parties before it whether a statute of the State impairs the obligation of a contract. Robb vs. Connolly, 11 U. S., 624, 637, 4 Sup. Ct., 544. Such decision, embodied in a judgment unreversed, is as binding with respect to the point adjudged as if it had been rendered by the Supreme Court of the United States. The distinction between the right and duty of the Supreme Court to decide for itself the question of contract or no contract without regard to the State decisions and its obligations to respect the bar of res adjudicata as between the parties, is quite clearly made in Douglas vs. Kentucky, 168 U. S., 488, 503, 18 Sup. Ct., 199, although not expressly commented on. In that case, after maintaining in the strongest terms, the obligation of the Supreme Court to exercise an independent judgment in determining the existence of a contract and its impairment, and after declining to follow a prior decision of the State Court upon the subject, the Court considered as a distinct matter, the question whether the point had not

been formerly adjudged in a State Court between the same parties, and pointed out with much care that the point of the former adjudication was not the same as that then before the Court. The whole discussion would have been wholly unnecessary if, as contended by counsel for defendants, the doctrine of res adjudicata has no application in the Federal Courts when the former adjudication is that of a State Court upon a question arising under the Federal Constitution."

After this Court, speaking by Mr. Justice White in New Orleans vs. Citizens' Bank, 167 U. S., 371, had reviewed the authorities in this court on the law in respect of estoppel by a judgment, the opinion is as follows: "And the law of Louisiana is exactly in accord with the rulings of this court, for, as said by the Supreme Court of Louisiana, in Heroman vs. Louisiana Institute of Deaf and Dumb et al., 34 La| Ann., 805-814:

"No principle of the law is more inflexible than that which fixes the absolute conclusiveness of such a judgment upon the parties and their privies. Whether the reasons upon which it was based were sound or not, and even if no reasons at all were given, the judgment imports absolute verity, and the parties are forever estopped from disputing its correctness. Cooley on Const. Lim., p. 47 et seq., and authorities there cited.

"Matters once determined in a court of competent jurisdiction may never again be called in question by parties or privies against objection, though the judgment may have been erroneous and liable to, and certain of reversal in a higher court. Bigelow Estoppel, 3d ed., Outline, pp. lxi., 29, 57, 103.

" 'The estoppel extends to every material allegation or statement which, having been made on one side and denied on the other, was at issue in the cause, and was determined therein.' Aurora vs. West., 7 Wall., 102; 4 N. Y., 113; 2 An., 462; 14 An., 576; 19 La., 318; 5 N. S., 664; 11 M., 607; 14 La., 233; 5 N. S., 170."

It follows, then, that the mere fact that the demand in this case is for a tax for one year and the demands in the adjudged cases were for taxes for other years, does not prevent the operation of the thing adjudged, if, in the prior cases, the question of exemption was necessarily presented and determined upon identically the same facts upon which the right of exemption is now claimed.

Our contention is that the question of exemption in the prior

suit was the issue made, and determined upon identically the same facts upon which the right of exemption is here claimed, and that therefore, that ordinary case of a suit for taxes for one year, is without application, for while the suit for taxes of a subsequent year is upon a distinct demand, yet when the question which was determined was the scope of an exemption, and that exemption held to include the identical tax involved in the previous suit, to deny the benefit of the judgment conclusively determined between the parties, that the exemption of the bank under its charter exists to the extent that the judgment itself determined, is to deny the force of the judgment altogether, and that is not the law of Tennessee. For it may be stated that the law of that State is that when a judgment or decree of a court of competent jurisdiction is once pronounced, upon a question directly involved in an action, it is conclusive between the parties and their privies, of all matters in controversy, of which the judgment or decree was the legal result, and the same can never again be drawn in question between the same parties or their privies, except by some proceeding in the way of an appeal, or bill of review.

Estell vs. Taul, 2 Yer., 467.
Green vs. Farris, 7 Yer., 161.
King vs. Vaughan, 8 Yer., 59.
Hodges vs. Buchanan, Id., 185.
Elrod vs. Lancaster, 2 Head, 574.
Warwig vs. Underwood, 3 Head., 238.
Brewster vs. Galloway, 4 Lea., 567.
McClanahan vs. Stovall, 6 Lea, 505.
Roper vs. Rowlett, 7 Lea, 321.
Parker vs. Cliff., 9 Lea, 524.

As far back as 1830 it was conclusively determined in Tennessee that a fact that had once been directly decided, shall not be again disputed between the same parties or their privies, and that therefore a judgment of the same court, or one of concurrent jurisdiction. whether upon verdict, demurrer or by default, if directly upon the same point, may be pleaded in bar as an estoppel.

Estell vs. Taul, supra, 469-470.

And again, the law of Tennessee has been that a decree of the Supreme Court of another State, construing a contract between two parties, is conclusive in a suit in Tennessee for the

same property, between the same parties, or those claiming through them.

Pigg vs. Ligon's Admr., 10 Yer., 469-471.

In the case, Judge Reese, speaking for the Court, said: "The task is not ours to fix a construction upon the ante-nuptial contract and determine the rights of the parties with regard to it. That has been done. It is res adjudicata, and the parties before the Court are concluded by it."

The construction given to a contract, where the point in controversy was its proper interpretation, brought for the purpose of having it determined, becomes, as to its construction, the very thing adjudged, and the parties to that suit are concluded thereafter forever by that construction, unless, because the construction itself effected a tax, the principle of estoppel had no application.

We cannot add to Mr. Justice White's argument on this point in New Orleans vs. Citizens Bank, supra, 398-399, and thereore we pass to the consideration of the two cases that are assumed to have established the law of Tennessee as to the efficacy of judgments pleaded as estoppels where taxes were involved.

According to the Supreme Court of Tennessee the respect to which it is entitled by reason of the eminence of the Judges, and their great learning, we respectfully submit to this court that where the dictum occurred in the case of the State vs. the Bank of Commerce, that first affirmed the proposition in these words: "These suits being for other years than those sued for in the Farrington case, that decision is not (as an adjudication) conclusive of the present case." Citing—

Cromwell vs. County of Sac., 94 U. S., 351.
Nesbitt vs. Riverside, etc., 144 U. S., 610.
The W. & W. R. R. Co. vs. Alsobrook, 146 U. S., 279.
Keokuk R. R. vs. Mo., 152 U. S., 301.

there was no plea of res judicata or judgment offered as evidence. The case was tried upon a demurrer to the bill of complaint filed by the State for the use of the city of Memphis, and the suit was in the alternative, to collect either ad valorem taxes upon the capital stock or upon the shares of stock. Mr. Farrington was not a shareholder in the Bank of Commerce. There was no party in privity with him, before the court in

the Union & Planters' Bank case. In the Bank of Commerce case it was held that the shares of stock were subject to taxation, and that the capital stock was exempt. A mere casual examination of the case reported in 11 Pickle, 221, will show that the statement of the law of Tennessee was a mere dictum, had no place in the decision, and ought not to have been there.

The next case involved three questions: First, whether the capital stock of the appellant was subject to ad valorem municipal taxes? That case is reported in 101 Tenn., 154-167.

It is quite noticeable that the court decided that the capital stock of the appellant bank was not liable to municipal taxes, because there was no law to tax it. The court proceeded to construe the decision of this court in the case reported in 161 U. S., and gave to the exemption that construction which was put upon it by Mr. Justice Peckham, although directly adjudging the non-liability of the bank to pay ad valorem taxes upon its capital stock disposed of the plea of res adjudicata, in these words: "We think the plea of res adjudicata in tax cases is to be limited to the taxes actually in litigation, and is not conclusive in respect to taxes assessed for other and subsequent years."

In the consideration of the case of New Orleans vs. Citizens' Bank, supra, on page 400, Mr. Justice White reviewed the two Iowa cases, and on page 401 said: "It follows then, that the theory by which it is sought to take questions of taxation entirely out of the rule of the thing adjudged is not only without foundation in reason, but is also without support of authority, since the case from this court which is cited to sustain it, cannot, properly, be said to sustain the contention, and the other from the Supreme Court of Iowa, has been either overruled or qualified."

Undoubtedly the ordinary suit for taxes is a plain action, but if the right to recover, or the defense thereto is based upon a particular ground, and thus the right of the matter is determined by a court of competent jurisdiction, then as that matter was adjudicated in the prior suit, in a subsequent suit for taxes on the same subject matter, for a subsequent year, the judgment in the prior suit is an estoppel, when so pleaded, and the law of Tennessee is not different from the general law.

Here the case is the judicial construction of a contract be-

tween the State of Tennessee and the appellant in a suit brought by the State of Tennessee to recover ad valorem taxes on the capital stock of the appellant, upon identically the same law, and where the identical defense now relied on was then relied on, and affirmed to be well made. Unless the doctrine of the estoppel of a judgment has no application to tax litigations, then the general rule in Tennessee is that the construction given to a contract in the prior suit, precludes a further consideration of that contract, and must prevail.

In Westbrook vs. Thompson, 104, Tenn., 363, on page 375, the Court, speaking by Judge Wilkes, said: "The complainant is precluded by the result of the original suit, from setting up any claim under his bill. That in the absence of a perfect transcript of such former case, the Court must presume that all the facts appeared to make the sale of the land valid and binding, and that the pleadings and proof were sufficient for that purpose, and the complainant is now estopped to claim anything on account of the annuity, or the sale of the land, either by subrogation or by way of personal judgment."

In Sale vs. Eichberg, 105 Tenn., 333, the Supreme Court of Tennessee stated the general rule as follows: "The estoppel of a judgment or decree extends to all matters material to the decision of the cause which the parties, exercising reasonable diligence, might have brought forward at the time. The question then is, Was the question of whether these legacies were special or general directly involved in the former suit? We are compelled to say it was. The defendant might have insisted that they were general legacies, and if the Court had so held the land could not have been sold."

From the Tennessee cases, it will be observed from the first to the last that where a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, that that matter is forever concluded between the parties and their privies, where the judgment is final.

It is undoubtedly true that by Section 1 of Article IV. of the Constitution of the United States, it is provided that full faith and credit shall be given in each State, to the public acts, records and judicial proceedings of any other State, and that under this power the Congress did at an early day enact that the said records and judicial proceedings, authenticated as afore-

said, "shall have such faith and credit given to them as they have by law or usage in the courts of the State from whence the said records are, or shall be, taken," but we submit that it is not the law of Tennessee that the plea of res adjudicata, because in a prior suit the question of taxation was involved, is to be limited so as to exclude its conclusivenes of the very matter in issue and decided in the prior suit, because the estoppel was pleaded in bar of the matter in a suit in respect of taxes assessed for other and subsequent years.

In the State against Bank of Commerce, 95 Tenn., 231, it was said: "These suits being for other years than those sued for in the Farrington case, that decision is not (as an adjudication) conclusive of the present case," and the authorities cited in support of that proposition not one of them sustained it, but it was a dictum, pure and simple.

Turley vs. Turley, 85 Tenn., 252-261.
U. S. vs. Bliss, 172 U. S., 321.
Byar vs. Campbell, 177 U. S., 649.

So the law or usage must rest alone for support upon what the Court said in the Bank vs Memphis, Supra, on page 167.

It is obvious from an examination of the case, that what was said by Judge McAlister was inadvertently said. He decided that the capital stock of the bank was not liable to taxation, because the Legislature made no provision for its assessment. See page 168. But he held that the bank was liable for privilege taxes to the city of Memphis and against the collection of such a tax there was pleaded a prior judgment.

On page 167 of the case, after reviewing the decision of this Court in the Union and Planters' Bank vs. County, in 161 U. S., Judge McAlister said: "The Court, after a review and discussion of the cases, held, viz., 'This determines the liability of the capital stock of the Union and Planters' Bank to taxation, and of course it overrules any claim on the part of that bank for exemption from taxation of its surplus or accumulated profits.'

"If, therefore, the principle of judgment estoppel is to be invoked, the last judgment of the highest appellate tribunal determines the taxability of said capital stock."

There was no question in the case of Shelby County against the Union and Planters' Bank, determined or to be determined, except whether the charter exempted from taxation the sur-

plus or accumulated profits of the bank, and therefore the only question determined was, that it did not. It is settled that where the only question presented and decided in the record, was the non-liability of a bank for taxation on its surplus that the judgment does not and cannot include other objects not embraced in the contention.

New Orleans vs. Citizens' Bank, supra, 401.

The opinion of the Supreme Court was based upon the first ground stated by Mr. Justice Peckham, and that in his belief at least the true interpretation of the charter exemption extended only to shares of stock in the hands of the shareholders. But it likewise appears by the opinion in the Farrington case, supra, that Mr. Justice Swayne was of the belief that the exemption was broad enough to, and did cover, other objects of taxation, for he said: "It may as well be said, the power is reserved to tax anything else as further tax the shares. We cannot so hold without interpolating into the clause a term which it does not contain. This we may not do. Our duty is to enforce the contract as we find it, and not make a new one.

95 U. S., 688-689.

In the case of the Southern Pacific R. R. vs. U. S., 168 U. S., 5, on pages 48 and 49, this Court, speaking by Mr. Justice Harlan, said:

"The general principle announced in numerous cases is that a right, question or fact, distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies, and even if the second suit is for a different cause of action, the right, question, or fact, once so determined, must as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them."

The last of the cases which Mr. Justice Harlan considered in his opinion was New Orleans vs. Citizens' Bank, supra, as to which, among other things, he said: "In New Orleans vs. Citizens' Bank it was held that the final and unreversed judgment of a court of Louisiana, of superior jurisdiction, upon the issue duly raised by the pleadings, whether the bank was exempt by contract with the State from taxes assessed against it for particular years, concluded that questions, as between the same parties and their representatives, in respect of taxes assessed against it for subsequent years. In that case the Court said: "The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies.'

These decisions were followed by this Court in the Kentucky tax cases, affirming the decrees of the Circuit Court at Louisville, shortly reported in 174 U. S.

In Forsythe vs. Hammond, 166 U. S., 506, Mr. Justice Brewer said: "The principles controlling the doctrine of res judicata have been so often announced, and are so universally recognized, that the citation of authorities is scarcely necessary. Though the form and causes of action be different, a decision by a court of competent jurisdiction in respect to any essential fact or question in the one action is conclusive between the parties in all subsequent actions." 517-518.

The Supreme Court of Tennessee undoubtedly fell into error by taking what Mr. Justice Peckham said as to the construction of the exemption clause in appellant's charter, as the thing adjudged. That which was adjudged was that the exemption clause did not extend so as to give an immunity from taxation to the surplus and undivided profits of the appellant. That is a distinct object of taxation from capital stock.

Farrington vs. Tennessee, Supra.

Giving to the statement of the Supreme Court of Tennessee its full force, and conceding that in the case cited, that the plea of res judicata was denied, then undoubtedly in the case that court gave no efficacy whatever to the previous judgment, although by that previous judgment, which was unre-

versed, there was a conclusive adjudication between the parties under identical circumstances and conditions of the very matter in issue, and thereby settled this question.

We submit the question is not what Judge McAlister said in the case reported in 101 Tennessee, but is what effect does a judgment of a Court of Tennessee have by the law or usage, in the courts of that State, when pleaded as an estoppel generally. IF THE COURT HAD JURISDICTION, IF THE JUDGMENT WAS FINAL AND UNREVERSED, AND A RIGHT, QUESTION OR FACT DIRECTLY PUT IN ISSUE AND DIRECTLY DETERMINED BY A COURT OF COMPETENT JURISDICTION IN TENNESSEE, AS A GROUND OF RECOVERY, WE SUBMIT THAT BY THE LAW AND USAGE IN TENNESSEE, THE JUDGMENT DETERMINING THE RIGHT, QUESTION OR FACT, WHEN PLEADED AS AN ESTOPPEL, OR RELIED ON AS EVIDENCE, IS, AS BETWEEN THE PARTIES OR THEIR PRIVIES, IN A SUBSEQUENT SUIT, CONCLUSIVE. If we take the cases of taxation out of the realms of estoppel, and affirm that no question where taxation is involved can be judicially determined except that of the particular demand in suit, then we engraft upon the doctrine of estoppel a doctrine wholly at variance with the principle established from the Duchess of Kingston's case which has universally obtained. In principle there is no difference between a plea of estoppel in favor or against a sovereign, or by and against individuals. The State of Tennessee is entitled to the benefit of estoppel and so are individuals sued by the State of Tennessee.

People vs. Stephens, 71 N. Y., 527-541.
People vs. Stephen & Gale, 52 N. Y., 306.

It is observable that the principles of estoppel by judgment are not subject to exception in favor of the sovereign, but they universally obtain, and universally obtaining as they do, the law and usage in Tennessee is in accordance with the latest utterances of the Supreme Court of that State, in the two cases cited, the one from 104 Tenn. and the other from 105 Tenn., supra.

In this view of the case the Circuit Court of Appeals committed a manifest error in its application of the provision quoted in Judge Lurton's opinion of the Revised Statutes of the United States passed pursuant to Section I of Article

4 of the Constitution of the United States, in that it did not give to the judgment and decree of the Supreme Court of Tennessee that faith and credit it was entitled to have by the law of the courts of the State.

WILLIAM H. CARROLL

and

TIM E. COOPER,

Attorneys for Appellant.

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FILED
MAR 14
JAMES H. MCKENNEY

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 67.

THE UNION AND PLANTERS' BANK OF MEMPHIS, TENNESSEE, PLAINTIFF IN ERROR,

vs.

THE CITY OF MEMPHIS AND JOHN ALSUP, TRUSTEE.

AND

No. 221.

THE UNION AND PLANTERS' BANK OF MEMPHIS, TENNESSEE, APPELLANT,

vs.

THE CITY OF MEMPHIS.

BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR AND APPELLEE.

JOHN H. WATKINS,
Counsel for City of Memphis.
Lucius E. Wright.

(18,069 and 18,369.)

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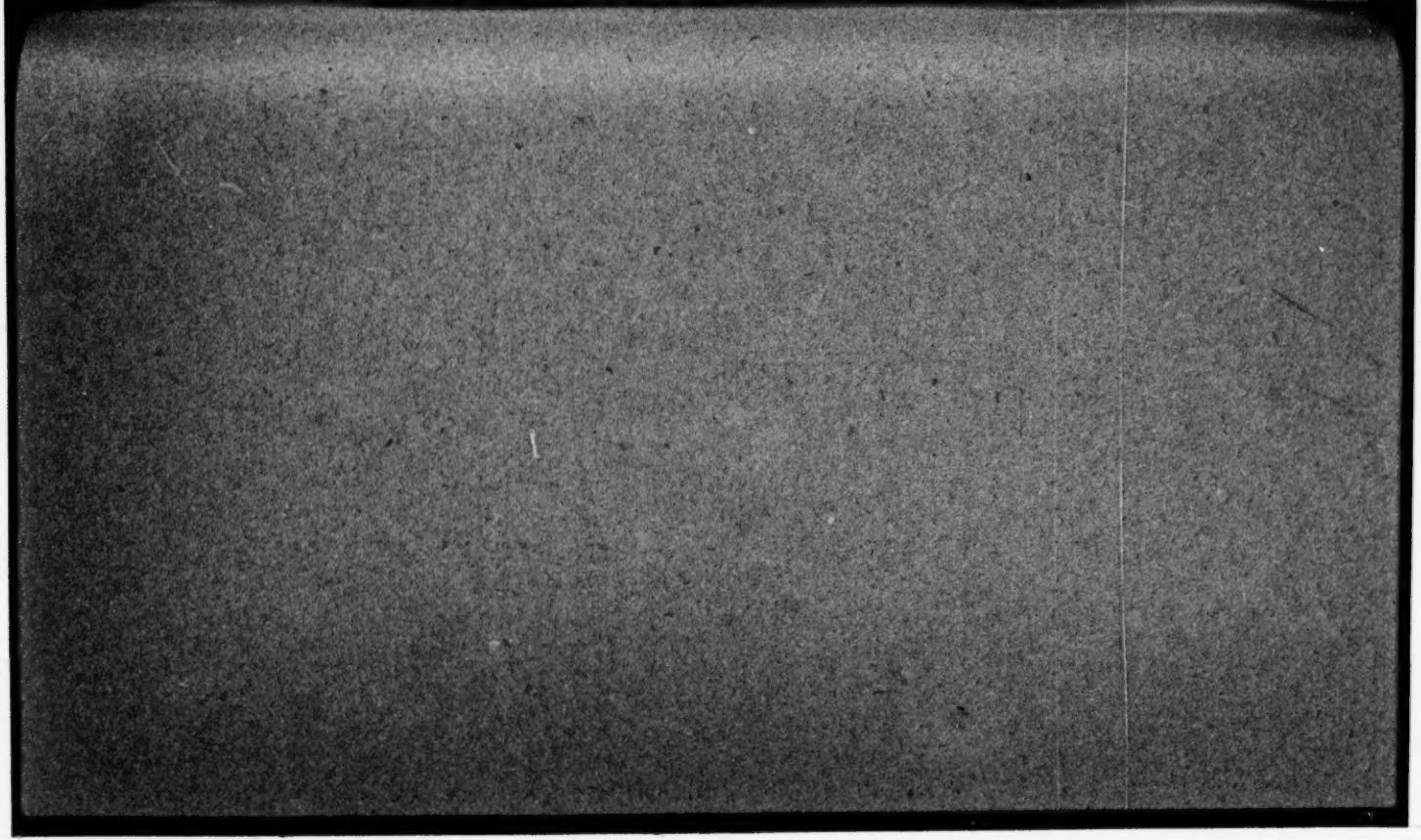

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BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR AND APPELLEE.

STATEMENT OF CASE.

The Union and Planters' Bank of Memphis, the plaintiff in error, is a corporation incorporated by and under a charter granted by the General Assembly of the State of Ten-

nessee in 1858 and having its situs in the city of Memphis, Shelby county, Tennessee. Said charter contained the following provision, to wit:

"That said company shall pay an annual tax of one-half "of one per cent. on each share of stock subscribed, which "shall be in lieu of all other taxes."

The city of Memphis, in pursuance of an act of the legislature of Tennessee, assessed an ad valorem tax for the year 1899 upon the capital stock of the complainant bank for municipal purposes.

On April 3, 1899, the Union and Planters' Bank filed its bill in the circuit court of the United States for the western division of the western district of Tennessee, wherein it is averred that the law under which this assessment was made impairs the obligation of the contract contained in the clause of its charter just quoted, by which it is claimed that complainant is exempt from all taxation upon its capital stock other than that provided in its charter.

The bill further averred that in a former litigation between complainant and the city of Memphis, wherein it was sought to enforce a municipal assessment of taxes upon complainant's capital stock for the years 1888, 1889, and 1890, it was solemnly adjudged and decided by the supreme court of Tennessee that under the charter provision aforesaid the capital stock of said corporation was exempt from all general taxation; and the record in said suit and the judgment of the supreme court of Tennessee is set out in full in said bill and plead and relied upon as a final judicial determination of complainant's exemption from the payment of ad valorem taxes on its capital stock to the city of Memphis

and as estopping said city of Memphis from bringing the validity or the true and proper construction of said charter provision again into controversy.

The bill also averred that the judgment so plead and set out was based upon the identical claim of exemption now asserted by complainant in order to defeat the taxes now in question, and that the judgment and decree aforesaid adjudged its claim to exemption upon the identical same facts and conditions as those appearing herein.

The bill further averred that said John H. Alsup is county trustee of Shelby county and *ex officio* collector of the ad valorem taxes due the city of Memphis.

The prayer of the bill is that the aforesaid assessment of taxes be canceled, and that complainant be declared to be contractually exempt from payment to the city of Memphis of ad valorem taxes on its capital stock.

The defendants demurred to the bill and assigned the following grounds therefor:

First. There is no diversity of citizenship, and no Federal question involved herein, and this court is without jurisdiction.

Second. The complainant has an adequate remedy at law; hence this court has no jurisdiction.

Third. The complainant, if it is entitled to any redress at all, has a plain and adequate remedy by paying under protest the tax demanded and suing to recover back.

Fourth. The former adjudication set up in the bill must be limited to the taxes actually in litigation, and the judg-

filed herein January 13, 1902, and designated by No. 221 on the docket of this court.

The case is, therefore, before this court on two records, which, by the agreement filed, are to be considered together and heard as one case.

The assignments of error in each record are substantially the same, and said assignments of error against the decree in the United States circuit court of appeals and set out in Record No. 221, page 46, are as follows, to wit:

"Comes the appellant and says that in the record and pro-
"ceedings in the above-entitled cause and court there is
"manifest error, and it assigns as error to the decree of the
"court herein entered on 21st of October, 1901:

I.

"The holding by the court that the tax laws set forth in
"the pleadings did not impair the contract between the
"appellant and the State of Tennessee, by which the appel-
"lant claimed an exemption from taxation under a provis-
"ion in its said charter, as follows: 'That the said company
"'shall pay to the State of Tennessee an annual tax of one-
"'half of one per cent. on each share of capital stock sub-
"'scribed, which shall be in lieu of all other taxes.'"

II.

"In affirming that the former litigation between the city
"of Memphis and the appellant, where it was sought to en-
"force a municipal assessment for taxes upon its capital
"stock for the years 1888, 1889 and 1890, did not conclu-
"sively adjudge that the capital stock of the appellant was

"contractually exempt from the payment of ad valorem "taxes to the city of Memphis, and did not estop the city of "Memphis from affirming that the true and proper con- "struction and meaning of the said charter was not to ex- "empt appellants' capital stock from ad valorem taxes to "the said city."

III.

"In affirming the judgment of the circuit court of the "United States for the western district of Tennessee sustain- "ing the demurrers of the respondent to the merits."

The demurrer filed by defendant to the original and supplemental bills in the circuit court at Memphis are set out in both records and are copied in Transcript No. 67, pages 17, 18, and in Transcript No. 221, on pages 17 and 18.

BRIEF AND ARGUMENT.

For defendants and appellees it is contended, first, that the Federal courts have no jurisdiction of the case, and this contention is on following grounds:

a. There is no diversity of citizenship.

b. No Federal question.

a. The first proposition is apparent from an inspection of the pleadings. Unless the requisite Federal question is present, this diversity must exist.

Railroad Co. *vs.* Swan, 111 U. S., 379.
Vanderson *vs.* Leverett, 31 Fed. R., 376.
Burgess *vs.* Seligman, 107 U. S., 20.

b. The precise point involved herein having been determined by both this Supreme Court and the State court, there is no longer any Federal or other question as to the taxability of appellant's capital stock as contradistinguished from the shares of stock.

Shelby County *vs.* Union & Planters' Bank, 161 U.S., 150.

Union & Planters' Bank *vs.* City of Memphis, 101 Tenn., 168.

2.

It is further contended for appellee that the former decisions of the supreme court of Tennessee set up and pleaded by the appellant are not conclusive of this case, and that tax decisions in Tennessee are *res adjudicata* only as to taxes involved in the litigation.

Whatever may be the rule elsewhere, there is such a well defined and unbroken line of decisions in Tennessee that judgments and decrees in tax cases are limited to the taxes actually involved that, as a local question, that proposition is no longer debatable.

State *vs.* Bank of Commerce, 95 Tenn., 221.

Bank *vs.* Memphis, 101 Tenn., 167–'8.

Buchanan *vs.* Springer (Ch. App.), 35 S. W. Rep., 774.

3.

This being a local question, it is contended next that the local law as to the effect of tax judgments will be followed by this court in cases involving the construction of a State statute or a former State judgment.

In a case which was decided in the eighth circuit the learned judge rendering the decision said:

"The general rule is that the laws of the several States "shall be regarded as rules of decision in the courts of the "United States in cases to which they apply. The judiciary "act requires this, and it would be the law independently of "that enactment. Under this rule the first question which "confronts the Federal appellate court is, What is the local "law applicable to the case?

"The local law which forms the rule of decision may "consist of a statute, or of the decisions of its supreme court, "or both," etc., etc.

Bergman *vs.* Bly, 66 Fed. R., 43.

"The inquiry is what is the settled law of the State at the "time the decision is made? This constitutes the rule of "property within the State by which the rights of the liti- "gant parties must be determined. As the Federal courts "profess to be governed by this rule, they can never act in- "consistently by enforcing it."

Lavin *vs.* Emigrant Sav. Bank, 1 Fed. R., 650.

Shelby *vs.* Gay, 11 Wheaton, 367.

Green *vs.* Neal's Lessees, 6 Pet., 299.

"The exposition given by the highest tribunal of the "State," said Justice Shiras in a case involving the contention that a State statute impaired the obligation of a contract, "must be taken as correct so far as contracts made under "the act are concerned."

Morley *vs.* Lake Shore R'y Co., 146 U. S., 166.

"It is a well-settled principle that the decisions of the "State courts in the construction of a State constitution and "laws are to be adopted by the Federal courts. This doc- "trine is established by numerous decisions."

Insurance Co. *vs.* Iron Co., 42 Fed. R., 376.

Further decisions upon this subject are as follows:

R. R. Co. *vs.* Blossburg *et al.*, 20 Wallace, 137–143.
Bank *vs.* Bank, 136 U. S., 235.
Lawton *vs.* Young, 52 Fed. Rep., 439.
Sanford *vs.* Roe, 69 Fed. R., 546.
Bauserman *vs.* Blunt, 147 U. S., 647.
Thompson *vs.* Sawyer Co., 57 Fed. R., 1030.
Bergman *vs.* Bly, 66 Fed. R., 40.
Luther *vs.* Borden, 7 How, 1.
Lavin *vs.* Sav. Bank, 1 Fed. R., 641.
Christy *vs.* Pidgeon, 4 Wall., 196.
Leffingwell *vs.* Warren, 2 Black, 603.
R. R. *vs.* Trust Co., 82 Fed. R., 124.
Hill *vs.* Hite, 85 Fed. R., 268.
R. R. Co. *vs.* Reed, 80 Fed. R., 234.
Rice *vs.* Adler, 71 Fed. R., 151.
Hodgson *vs.* Burleigh, 4 Fed. R., 121.
Durden *vs.* Malloy, 43 Fed. R., 407.
R. R. Co. *vs.* Guest, 84 Fed. R., 628.
Southerland *vs.* Village of Ernst, 86 Fed. R., 597.

It is the contention, therefore, of appellee that the rule of decision in Tennessee upon the question of *res adjudicata* constitutes a property rule, as well as its decisions upon its

statute laws, which rule of decision the Federal courts have repeatedly announced they will follow.

Thus the decision of the court in the Kentucky Bank cases, while involving an exemption clause which is entirely different from the one under consideration here, was in line with the decision of the Kentucky courts upon the question of the estoppel of a judgment in tax cases.

It was said in the following case:

"It is well settled that if a contract be valid under the "law as previously expounded by courts, and as understood "at the time, no subsequent judicial action will render it "invalid. Parties have the right to, and do contract with "a view to the law then so declared. It is equally just that "the same rule should apply as to duties required of them, "such as the listing of their property for the payment of "taxes, etc."

Franklin Co. *vs.* Louisville R. R. Co., 84 Ky., 65.
Citing Alcott *vs.* Supervisors, 16 Wall., 678.

In Louisiana the express question whether a former adjudication in a tax suit is *res adjudicata* as to taxes for other years, according to the State rule of decision, seems never to have arisen or been decided. Hence the supreme court in the Louisiana cases relied on by appellant followed the general rule of applying its own interpretation to an open question.

The decision of the Tennessee court on the question of *res adjudicata* as to taxes is that the rule does not apply to taxes accruing subsequent to the decision; and upon the question of the liability of the appellant's capital stock to

taxation in favor of the taxing power, the decision of the supreme court of Tennessee in Bank *vs.* City, 91 Tenn., 547, and of the Supreme Court in 161 U. S., 150, unless the former decision of the supreme court of Tennessee constitutes an estoppel, are the law governing the case today.

Concerning the decision relied upon as an estoppel, the supreme court of Tennessee said:

"It is well known that the opinion of this court in State "*vs.* Union & Planters' Bank, 7 Pickle, 551, was brought "about by what this court deemed to be the true construc- "tion and effect of the opinions in the Farrington case, "95 U. S., and the Bank of Commerce case, in 104 "U. S." * * *

And as to the plea of *res adjudicata* raised in that case:

"It would be strange if, under a Constitution such as ours, "a mistaken judgment of this court, declared in most em- "phatic terms not to be its own judgment, but to have been "rendered in supposed obedience to that of an appellate "tribunal—the United States Supreme Court—can be in- "voked as a judgment estoppel, now that the same appellate "tribunal has decided that identical question in favor of the "State, and against the bank, and that this court was mis- "taken in its rendering of their former opinions."

Bank *vs.* Memphis, 101 Tenn., 164–'5.

And the Supreme Court of the United States in the case referred to by the learned justice of the Tennessee supreme court, speaking by Mr. Justice Peckham, said of the Tennessee adjudication, set up as *res adjudicata*:

"Generally the courts of that State held, before the decision "by this court of the Farrington case, that the charter tax "was laid upon the corporate capital stock, and the exemp- "tion was of that stock from any further tax. Subsequently "to the decision in that case, the State courts have held that "under the construction given to the clause in the Farrington "case, and in Bank *vs.* Tennessee, 104 U. S., 493, the tax was "on the shares, and the exemption covered both capital stock "and the shares thereof."

"The decision giving exemption to both classes of property "was adjudged alone upon the authority of the case cited. "In such a case as this, where we are to construe the mean- "ing of the clause of the statute as to what contract is con- "tained therein, and whether the State has passed any law "impairing its obligation, we are not bound by the previous "decisions of the State courts, except when they have been "so long and so firmly established as to constitute a rule of "property (which is not the case here), and we decide for "ourselves independently of the decisions of the State courts, "whether there is a contract, and whether its obligation is "impaired."

Shelby County *vs.* Union, &c., Bank, 161 U. S., 151.

If the decision relied upon as *res adjudicata* was not controlling of this court in the case just cited—Shelby County *vs.* Union & P. Bank, 161 U. S., 151—it is not controlling in the present case. The former adjudication, rendered by the supreme court of Tennessee under a misapprehension of the United States Supreme Court's holding, may properly be, and should be, disregarded by this court in the present case as it

has been by the subsequent decisions in Tennessee and in this court.

It is further contended for the appellee that the defense of *res adjudicata* predicated upon the 7th Pickle case is not well founded, because we have already fully shown that according to the local rule of decision in Tennessee taxes for different years are not considered the same subject-matter, and the doctrine of *res adjudicata* does not apply.

State *vs.* Bank of Commerce, 95 Tenn., 221, and other authorities *supra.*

The litigation was, moreover, between the State and the bank, under the framing which the law required tax suits to assume at that time, and the suit was *res inter alios acta.*

The statute under which the decision relied on was rendered, while similar to that under which the taxes involved were assessed, is not the same statute or subject-matter. The principle involved, therefore, is *stare decisis* and not *res adjudicata.* The later act repealed the former one under which the decision was rendered. No contract rights were entered into on account of that decision. In such cases an adjudication as to taxes assessed under the former act has been held not to be *res adjudicata* as to taxes assessed under the latter.

In the following case from Iowa it was said:

"In addition to what has been above said on this point, it "may be further remarked, that the statute under which the "former judgment was rendered was repealed by chapter "196 of the Laws of 1868, which took effect April 29th, "1868, and this act was superseded by chapter 106 of the "Laws of 1870. Thus the taxes of 1868 and subsequent "years were levied under statutes passed after the adjudica-

"tion pleaded as an estoppel; and while the act of 1868 is "similar in its main features to the act of 1862, which was "in force when the injunction decree was rendered, yet a "judgment involving the construction of a statute, and turn- "ing upon such construction, cannot be invoked, after its "repeal as an estoppel as to the law under a subsequent "statute though similar in its provisions; for this would "deny to the court the power to determine whether the "subsequent statute should receive the same or a differ- "ent interpretation from that placed upon the repealed "statute. It would tie the hands of the court and prevent "a construction of the subsequent statute. This cannot be "allowed. The former decision may be *authority* in a case "arising under the subsequent statute, but it cannot be ad- "mitted as an estoppel upon the law questions involved in the "subsequent action."

In this case it was held:

"Each year's taxes constitute a distinct and separate cause "of action. They do not in any sense grow out of the same "transaction."

Davenport *vs.* Railroad, 38 Ia., 640.

4.

The present law, as announced by this court and the supreme court of Tennessee, is controlling in this case.

It is contended for the appellee that if the decision by the Tennessee court in Memphis *vs.* Bank *et al.*, 91 Tenn., 546, be considered as an adjudication at all, which we submit it is not, as it has been expressly held by the supreme court of that State to have been made under a misapprehen-

sion of this court's holding in the Farrington case, that the effect of the decision in U. & P. Bank *vs.* City of Memphis, 101 Tenn., 154, would be to overrule that case, and hence the doctrine of *res adjudicata* would not apply.

"The inquiry is, what is the settled law of the State at "the time the decision"—the decision in this case—"is made?"

Lavin *vs.* Emigrant, &c., Bank, 1 Fed. R., 650.

The Federal courts have repeatedly affirmed this doctrine—that on local questions they would follow the latest decisions of the State court, even though they overturned former decisions, *where no contract rights had been entered into upon the strength of the former adjudication.* And here permit us to direct attention to the fact that no contract rights whatever involved in this case have been entered into upon the strength of the alleged adjudication of Memphis *vs.* Bank, 91 Tenn., 546, for the charter involved here was accepted by the bank long before such decision and could not possibly have been entered into upon any supposed rights fixed by that decision. It was not as if this decision had been read into its charter. The annulling of that decision did not violate any contract right obtained on account thereof.

"The construction given to a statute of a State by the "highest tribunal of such State is regarded as a part of the "statute and is as binding upon the courts of the United "States as the text. *If the highest tribunal of the State "adopt new views as to the proper construction of such statute "and reverse its former decisions, this court will follow the latest "settled adjudications.*"

Bauserman *vs.* Blunt, 147 U. S., 654.

"It is well settled that these courts in construing the "statute laws of the several States will follow the latest de- "cisions of the court of last resort in the particular State "whose statute is before the court for construction."

Thomas *vs.* Burney, 35 Fed. R., 115.

There are three State statutes involved in this case, to wit, the two private statutes constituting the appellant's charter and amendment thereof and the public statute alleged to be in violation of its rights under its charter, together with the State's rule of decision upon the question of *res adjudicata* with reference to taxes. We submit that the rule announced in the foregoing quotations should control this case, to wit, that the settled law of Tennessee, at the time the decision in this case is made, should govern.

Under the Tennessee doctrine there is no such thing as *res adjudicata* in tax cases, except for the particular taxes involved. This works no greater hardship upon the litigant than the rule limiting the judgment estoppel to the specific thing involved in matters other than taxes. The question is rather one of *stare decisis* than *res adjudicata*, and it has been said that "there is no vested right to claim the benefit "of any particular decision of a court."

Talliaferro *vs.* Barnett, 47 Ark., 359.

The decisions of the Federal courts where former adjudications of the State courts have been held to be judgment estoppels are in all cases where such decisions amount to a rule of property or where contracts rights have been entered into upon the assurance afforded by the decisions. The judgment relied on by appellant constitutes no such rule of

property, as has already been held by this court in case of Shelby Co. *vs.* Union, &c., Bank, 161 U. S., 151.

Such were the considerations governing this court in the case of Kenosha *vs.* Lamson, 9 Wall., 477; Lee Co. *vs.* Rogers, 7 Wall., 181, and kindred cases.

As already shown, the last adjudications of the State court constitute the rule of decision in this court where previous adjudications do not constitute a rule of property, and that therefore the weight and effect of such former State judgment is a local question.

In the Kentucky Bank cases relied on by appellant it was said that the rule that the Federal courts will not follow the construction of the State courts where a State law impaired the obligation of a contract was limited to cases where the judgment of the State courts was under direct review. The judgment of the State court is not under review in this case, but the judgment of the circuit court of the United States. Hence the latest judgment of the State court is controlling.

Other cases are—

Bank of Ky. *vs.* Stone, 88 Fed. R., 397.
Bauserman *vs.* Blunt, 147 U. S., 647, *supra.*
Morely *vs.* Lake Shore R. R., 146 U. S., 162.
Miller *vs.* Swan, 150 U. S., 132.
Traction Co. *vs.* Belt R. R. Co., 151 U. S., 137.
Marchant *vs.* R. R. Co., 153 U. S., 380.
Fallbrook *vs.* Brawley, 164 U. S., 112.
Bank *vs.* Chehalis, 166 U. S., 440.
Wilson *vs.* So. Carolina, 169 U. S., 586.
R. R. *vs.* Nebraska, 164 U. S., 403.
Bank *vs.* Pennsylvania, 167 U. S., 461.

5.

The capital stock of appellant is by law subject to taxation.

The first assignment of error by the appellant raises this question of the liability of its capital stock to taxation, and it is contended for the appellee that it is so liable, and that the question of such liability has been settled.

What is, under the decision, the present law as to the taxability of appellant's capital stock?

In considering this question, appellant's contention that there has been no decision of either the Federal or State courts upon the question is necessarily answered.

The proposition of the appellant is that the taxability of its capital stock was not decided in either Memphis *vs.* Bank, 15 Pickle (101 Tenn., 547), or Union & P. Bank *vs.* City of Memphis, 161 U. S., 150.

There were two contentions made by the bank in the State court in the first case referred to, the first being—

"(1.) That the capital stock of said Union and Planters' "bank is exempt from general taxation by its charter or act of "incorporation, which provides," &c., quoting the exemption clause.

(2.) The second contention was that, even if the decision should be against the bank on the first proposition, it must escape taxation because of the defect in the act of 1895, which has been cured by the Tennessee acts of 1897 and 1899—that is to say, that any banking corporation whose shares of stock are exempt shall pay upon its capital stock.

The question of the taxability of appellant's capital stock was therefore expressly before the court for decision in that case; was so treated and fully considered by the Tennessee court. All the questions raised here were raised in that case by the bank, the appellant here, including the plea of *res adjudicata*, the 7th Pickle case. The appellant here certainly considered that question as being involved in that suit. The decision was that the bank was subject to taxation upon its capital stock, but because of the defect of the act of 1895—a technicality—it would escape for the time being. We submit that the decision has all the force of an adjudication, and was so considered by all the parties to that suit, and by the court.

It was said in the case now commented upon:

"It is not insisted by the bank that there is a judgment "estoppel against the county, nor could such an insistence "prevail, since the county was not a party to the two cases "now relied on as adjudicating the question here presented."

So that a decision in favor of the appellant here would result in the inconsistency that the bank would be liable for State and county taxes upon its capital stock, but not to the city, whose taxes are based upon the State and county assessment.

Nor is the proposition tenable that the taxability of appellant's capital stock was not involved in or under consideration in Shelby Co. *vs.* U. & P. Bank, 161 U. S., 150. The question of the taxability of the capital stock was treated by the court as controlling of the question of the taxability of the surplus, the two being *ejusdem generis*, and the status of one necessarily determined in fixing the status of the other.

That the decision in 161 U. S. was based upon the proposition that the capital stock is taxable is too plain for debate. The Supreme Court said in the two concluding paragraphs of the opinion:

"We have found no case in this court which is authority "for the proposition that language such as is under consid- "eration in this case exempts from further taxation both "the capital stock of the corporation and the shares of stock "in the hands of the individual shareholders. As the Far- "rington case decides that this language does import that "the charter tax is laid upon the shares in the hands of the "individual shareholders, and that those shares are exempt "from further taxation, that question is set at rest, and there "being nothing in any case which extends that language to "both properties, *we hold that when it is made applicable to "the separate shares in the hands of the individual shareholders "it does not apply to or cover the case of the capital stock of the "corporation, and such stock is liable to be taxed as the State "may determine.*"

"This determines the liability of the capital stock of the "Union and Planters' bank to taxation, and of course it "overrules any claim on the part of that bank for exemp- "tion from taxation of its surplus or accumulated profits. "The question whether such surplus could be taxed if the "capital stock itself were to be regarded as exempt has also "been decided in the preceding case of the Bank of Com- "merce. The decree of the circuit court must therefore be "reversed," etc., etc.

Shelby Co. *vs.* U. & P. Bank, 161 U. S., 161.

Upon the authority of these cases, the question involved in this case is no longer an open one of any sort.

In addition to the foregoing, we beg leave to submit in support of the contentions herein set forth the able and learned opinion of Judge Lurton, delivered in this case in the circuit court of appeals, at Cincinnati:

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

THE UNION AND PLANTERS' BANK OF MEMPHIS, *Appellant*, *vs.* THE CITY OF MEMPHIS, *Appellee*. } No. 924.

Appeal from the circuit court of the United States for the western district of Tennessee.

Submitted June 10, 1901; decided October 21, 1901.

Before Lurton, Day, and Severens, circuit judges.

The case is this: In 1859 the State of Tennessee, by its General Assembly, granted a charter under which the Union and Planters' bank was organized. That charter contained a provision upon the subject of taxation in these words: "That said company shall pay to the State of Tennessee an annual tax of one-half of one per cent. on each share of stock subscribed, which shall be in lieu of all other taxes."

The complainant's bill avers that in impairment of the obligation of this contractual exemption from every tax except that provided by the charter, the State of Tennessee has passed a law providing, among other things, for the assessment of State, county and city taxes upon the capital stock of this and all other corporations having like contractual exemptions, and that the city of Memphis under

and in pursuance of the legislation referred to has assessed an ad valorem tax for the year 1899 upon the capital stock of the complainant bank for municipal purposes exceeding $2,000.00, and is about to distrain, etc.

It is averred that the law under which this assessment has been made impairs the obligation of the contract by which complainant is exempt from all taxation upon its capital stock other than that provided for in its charter. It is then averred that in a former litigation between this complainant and the city of Memphis where it was sought to enforce a municipal assessment of taxes upon complainant's capital stock for the years 1888, 1889 and 1890, it was solemnly adjudged and decided that under the charter provision aforesaid the capital stock of said corporation was exempt from all general taxation. The record in the said suit and the judgment therein rendered, being a judgment of the supreme court of Tennessee, is set out in full and plead and relied upon as an adjudication estopping the said city of Memphis from bringing the validity or the true and proper construction and meaning of said provision again into controversy. The bill is most specific in averring that the judgment so plead and set out as establishing the exemption of its said capital stock from taxation was based upon the identical claim of exemption now asserted by it in order to defeat the taxes now in question, and that "the judgment and decree aforesaid adjudged its claim to exemption upon the identical same facts and conditions" as those appearing herein.

Upon this former judgment between the same parties and upon the same facts and issues the complainant bank avers and contends that the question of the right of the city of Memphis to assess its capital stock "has been finally judicially determined not to exist, because of the judicial construction put upon its exemption in the suit to determine that question between it and the said city of Memphis."

The defendant filed a demurrer assigning no less than

twelve reasons why the complainant's bill should not be sustained. This demurrer was sustained and the bill dismissed.

LURTON, circuit judge, having made the foregoing statement of the case, proceeded then to deliver the opinion of the court:

1. The demurrers which go to the jurisdiction of the court are not well founded. The jurisdiction does not depend upon diversity of citizenship, for that does not exist, but upon the Federal question arising out of the alleged violation of the obligation of the contract contained in the charter of the complainant corporation.

The bill attacks the constitutionality of the revenue laws of 1897 and 1899 so far as they authorize the imposition of a tax upon the capital stock of the Union and Planters' bank as a law impairing the obligation of the charter exemption (Bank of Kentucky *vs.* Stone, 88 F. R., 383, 390; Stone, auditor, *vs.* Farmers' Bank of Kentucky, 174 U. S., 409, 412).

2. Neither is the demurrer to the equitable jurisdiction of the court well founded.

The remedy by suit at law to recover a tax paid under protest given by the Tennessee act of 1873, ch. 44, being section 1059 Shannon's Revision of the Tennessee Code, applies only to revenue due the State (City of Nashville *vs.* Smith, 2 Pickle, 213).

It has no application where the tax complained of is one assessed by a county or city. In such case the only legal remedy to recover an illegal tax is that furnished by the common law (Railroad *vs.* Williams, 101 Tenn., 146).

There must exist some equitable ground for relief besides the mere illegality of the tax. If it appears that the tax constitutes a cloud upon the title of the complainant, or that he will be subjected to irremediable damages, or to a multiplicity of suits, if compelled to rely upon his legal remedy

alone, equity will interpose upon the ground of the inadequacy of the remedy at law (Dows *vs.* Chicago, 11 Wall., 198; Union Pacific R'y. *vs.* Cheyenne, 113 U. S., 516, 525; Ogden City *vs.* Armstrong, 168 U. S., 224, 238; Bank of Kentucky, *vs.* Stone, 88 F. R., 383).

The case made by the bill is not the case of an objection to a single or particular assessment. The complainant sets up a claim of complete exemption not only against the particular assessment, but against all future efforts to assess its capital stock. As observed by Chief Justice Marshall in Osborn *vs.* Bank, 9 Wheat., 738, 842, "the single act of levying the tax, in the first instance, is the cause of an action at law; but that affords a remedy only for the single act, and is not equal to the remedy in chancery, which prevents its repetition and protects the privilege."

The bill in substance avers that there have been many previous litigations between the complainant and the State of Tennessee, the county of Shelby and the city of Memphis, in which the right to levy taxes upon its capital stock was asserted and the exemption claimed under the charter was denied. Complainant sets out in full one such former litigation with the city of Memphis, resulting in a judgment of the supreme court of the State judicially determining the exemption of its capital stock from any and all taxes other than the charter tax.

Notwithstanding these former litigations the defendant is charged with persisting in a denial of the exemption claimed. Under such circumstances it would appear that the complainant is entitled to the remedy in chancery for the purpose of preventing repetitions of such assessments in the future, and thereby preventing a multiplicity of suits (Bank of Kentucky *vs.* Stone, 88 F. R., 383, 392; Morris Canal & Banking Co. *vs.* Mayor of Jersey City, 12 N. J. Eq., 227; High on Inj., sec. 530).

3. Is the capital stock of the complainant company contractually exempt from taxation other than the charter tax

of one-half of one per cent. on each share of stock subscribed?

Does this exemption apply to the corporate capital in the hands of the corporation, or to the shares of capital stock in the hands of shareholders, or are both species of property equally exempt from any tax other than that payable by the express provision of the charter?

Curiously enough we are not lacking in very high authority upholding each of three possible constructions of the taxing clause of the complainant's charter.

Thus in Memphis *vs.* Farrington, 8 Bax., 539, the supreme court of Tennessee held that language similar and identical in meaning found in the charters of a number of Tennessee banks and insurance companies operated only to exempt the capital stock of such corporation in the hands of the corporation upon the payment of the charter tax stipulated for, but that shares of stock, being a distinct property, were not exempt, but were subject to taxation in the hands of shareholders. This decision was made in 1876, in a case between a stockholder in the complainant bank, as well as in other corporations, in which Farrington stood for and represented the entire class of stockholders, the city of Memphis and the State of Tennessee being the adversary parties. The complainant corporation was not a party to the suit and the real question involved was that of the taxability of shares of stock in the hands of shareholders.

That case was taken, on writ of error, to the Supreme Court of the United States and there reversed, that court holding in an opinion by Justice Swayne, that the exemption granted extended to the shares in the hands of shareholders. Three members of the court dissented, holding that the exemption did not extend to shareholders, and that the judgment of the Tennessee court should be affirmed. The judgment of the Tennessee court was accordingly reversed and the shareholders held to be exempt from any

tax other than that stipulated to be paid by the corporation (Farrington *vs.* Tennessee, 95 U. S., 679).

In Bank of Commerce *vs.* McGowan, 6 Lea, 703, the liability of the Bank of Commerce to be assessed upon its bank building and upon several parcels of realty bought in payment of debt was involved.

The court held that the bank building was exempt under a provision of the charter providing that the bank "shall pay to the State an annual tax of one-half of one per cent. on each share of its capital stock, which shall be in lieu of all other taxes," but that this exemption would not extend to the real estate bought in satisfaction of debt due the bank. This result was reached upon the assumption of the exemption of the capital stock of the bank and upon the authority of the case of the De Soto Bank *vs.* Memphis, 6 Bax., 415, where it was held that the bank's power to hold real estate was limited by the charter to the real estate necessary for the conduct of its business and the corporate capital used for the purposes of the corporation, and that the contract ceased to operate when taxable property was held for other purposes. In respect of the opinion of the Supreme Court of the United States in Farrington *vs.* Tennessee, 95 U. S., 679, Judge Cooper, speaking for the court, said:

"There is nothing in conflict with this view, as the learned counsel of the complainant seem to think, in the decision of the Supreme Court of the United States in Farrington *vs.* Tennessee, 95 U. S., 679. It was there held that the provision in a bank charter, like the one before us, is a contract, and will protect the shares of the stockholders from additional taxation. We recognize the controlling authority of that court in such cases, and yield to its decisions. The provision in question will, therefore, protect the capital stock and the shares of the stockholders from any taxation beyond that prescribed in the charter."

That case was affirmed upon a writ of error sued out by the bank, the case being reported as the Bank of Commerce *vs.* State of Tennessee, 104 U. S., 493. Both of these decisions were made in 1881.

The next opinion in point of time proper to be referred to is that of The City of Memphis against The Union and Planters' Bank, the appellant herein, in which the city sought by a bill in equity to compel the payment of city taxes for the years 1887 to 1891, inclusive, assessed upon the corporate capital of the bank. The bill also sought to compel the payment of a privilege tax for the years 1889, 1890 and 1891 imposed by the city for the right of exercising its franchises of doing a banking business in the city.

The bill averred that the bank claimed an exemption from all taxation upon its capital stock as distinguished from the shares in the hands of stockholders by virtue of the charter contract heretofore set out, and claimed that it was neither subject to the ad valorem or privilege tax which had been imposed, and therefore refused to pay. The contention of the city as set out on the face of its bill was that the true and proper interpretation of the charter exemption referred to was to exempt the shares in the hands of shareholders from any tax other than that which the bank was required to pay under its charter, and that the corporation as such was liable to pay taxes upon its capital stock and upon its franchises notwithstanding the terms of the charter.

The court sustained the demurrer of the defendant bank and dismissed the bill, holding that the bank was exempt from both species of tax by reason of its charter exemption.

Touching the former decisions of the court construing and applying the charter exemption involved, Judge Caldwell, speaking for the court, said:

"Since the decision in the Farrington case by the Supreme Court of the United States, this court has uniformly adhered to its previous holding, that no ad valorem tax can lawfully

be laid on the capital stock, and, in recognition of that decision, has gone further, and said that shares of stock are likewise exempt from other taxation than that prescribed in the charter" (Bank of Commerce *vs.* McGowan, 6 Lea, 705; The State *vs.* Butler, 13 Lea, 406; The State *vs.* Butler, 2 Pickle, 633).

Continuing, the learned judge said:

"Considering the decisions of the Supreme Court of the United States in Farrington *vs.* Tennessee, 95 U. S., 679, and in Bank *vs.* Tennessee, 104 U. S., 493, together, and giving them the controlling weight to which they are entitled, it cannot be held otherwise than that the charter tax of one-half of one per cent. is in lieu of all other taxes, whether against the bank on its capital stock or against owners on shares of stock. Under the construction there given, the charter exemption includes both.

"As an original question, we would hold as held by this court in Memphis *vs.* Farrington, 8 Bax., 539, and charge the stockholders with an ad valorem tax; but upon authority, we hold as stated abode.

"This court has never decided, and, in the absence of the ruling of the Supreme Court of the United States in Farrington *vs.* Tennessee, 95 U. S., 679, would not now decide that the charter gives the owners of shares of stock any immunity or exemption from taxation on the shares. That question is now adjudged alone upon the authority of that case. It did not arise, and was not adjudged, in Bank of Commerce *vs.* McGowan, 6 Lea, 705; in The State *vs.* Butler, 13 Lea, 406, or in The State *vs.* Butler, 2 Pickle, 633.

"Complainant seeks, in addition to what has already been stated, to recover from the bank $1,800.00 as privilege taxes for the years 1889, 1890 and 1891. These taxes are claimed from the corporation for the right of exercising its franchises—for the privilege of doing a banking business. Manifestly, the charter tax was intended to cover this right or privilege. The language of the charter implies, that, in consideration of the public good and the payment of the tax therein specified, the State will allow the corporation to exercise the franchises granted without further taxation (City of Memphis *vs.* Hernando Ins. Co., 6 Bax., 527; Union Bank *vs.* State, 9 Yerg., 490).

"The case of New Orleans City, etc., *vs.* New Orleans, 143 U. S., 192, is not, as we understand it, an authority against this ruling. There the contract afforded 'no evidence of an intention' to exempt the corporation from license or privilege tax (*ib.*, 195); here the intention to do so is clear and unmistakable. The charter tax was imposed primarily as a consideration for the corporate franchises and the right to exercise them. No other reasonable construction can be placed upon the words of the charter.

"The State is bound by its contract; and so, likewise, is the city of Memphis, which is but an arm or agency of the State government. This is true not only as to privilege taxes, but also with respect to the other taxes claimed in this case. All subjects of taxation covered by the charter tax are exempt from further assessment, whether made in behalf of the State, county or municipality.

"As to those subjects, the specified tax is in lieu of all the other taxes—State, county and municipal. Such is the undoubted meaning of the contract (City of Memphis *vs.* Hernando Ins. Co., 6 Bax., 527; Union Bank *vs.* The State, 9 Yerg., 490; Nashville *vs.* Thomas, 5 Cold., 600)."

The effect of the judgment in the case last cited as an estoppel and bar to the assessment of taxes upon the capital stock of the appellant bank by the city of Memphis is the principal question in the case now before us.

For the present, however, we will continue the history of the litigations which involve the extent of the exemption.

The next decision in point is that of Shelby County *vs.* Union & Planters' Bank, 161 U. S., 149. In that case the charter exemption here involved was construed as not including capital stock or surplus and accumulated profit, and as exempting only the shares of stock in hands of the shareholders. The Farrington case, 95 U. S., 679, is there construed as not inconsistent with the conclusion stated.

After the decision last cited the city of Memphis again sought to tax the capital stock of the complainant bank and assessed same for the years 1896 and 1897.

The bank filed its bill in a chancery court of the State to enjoin the city from enforcing the collection of said tax and set out in its said bill two distinct grounds upon which it resisted the enforcement of said assessment.

1. That its capital stock was exempt under the charter provision already mentioned, and that such exemption had been duly adjudged in previous litigations which had the force of *res adjudicata*.

2. That the revenue law of the State provided that "no tax shall hereafter be assessed upon the capital stock of any bank, banking association or loan or trust, insurance or investment companies, but the shareholders in such bank or other association shall be assessed and taxed upon the market value of their shares of stock herein."

The city answered, asserting its power to make said assessments, and denied the exemption of the complainant's capital stock under its charter, and denied the force of the former decision as *res adjudicata*. After answering, the city filed a cross-bill for the purpose not only of enforcing the payment of the ad valorem tax so assessed against the capital stock of said bank, but also for the purpose of compelling payment of certain privilege taxes due the city for the same year.

Upon the pleadings and proofs the chancellor held the bank not liable for either tax, and perpetually enjoined the city from enforcing payment and dismissed the cross-bill. From this decree the city appealed to the supreme court of the State of Tennessee, which reversed the decree of the court below, holding that the capital stock was not exempt, but that the particular assessments complained of were invalid because the revenue law of the State did not provide for the assessment of the capital stock of any bank. It further held that the privilege tax was authorized under the existing law and the bank liable therefor.

In respect to the force and effect of the former decision of the same court adjudging the capital stock not liable to any general taxation as *res adjudicata*, the court held:

1. "That the effect of the decision in favor of the exemption of such capital stock from general taxation was nullified by the later decision of the Supreme Court of the United States in the case of Shelby County *vs.* Union and Planters' Bank, 161 U. S., 149, holding that the charter exemption had no application to corporate capital stock."

2. "That its former judgment involved a different cause of action, to wit: The taxes assessed for years prior to the assessment then complained of, and that 'the plea of *res adjudicata* is to be limited to the taxes actually in litigation and is not conclusive in respect of taxes assessed for other and subsequent years.'"

It is plain from this history of the litigation involving the scope of the charter exemption claimed, and of like exemptions in other charters, that as a mere question of authority the exemption claimed in favor of appellant's capital stock does not exist, and that this court in the interpretation of the charter exemption should accept as authoritative the opinion of the Supreme Court of the United States in Shelby County *vs.* Union and Planters' Bank, 161 U. S., 149.

But the duty of interpreting the scope and meaning of the exemption clause may be regarded as eliminated if it be true, as claimed, that the exemption exists as claimed because it has been so determined by the judgment relied upon as *res adjudicata*.

On this point, in New Orleans *vs.* Citizens' Bank, 167 U. S., 371, 387, Mr. Justice White, speaking for the court, in a case where a charter exemption was claimed from general taxation by force of certain former judgments, said:

"Of course, if the judgments are the things adjudged and conclusively determined as between parties that the exemption of the bank under its charter exists, to the extent determined by the judgments, the duty in that regard of discussing the charter itself will be eliminated, since the effect of the thing adjudged will be to settle that question."

Passing then the interpretation of the scope of the charter exemption as an original question, and as affected by the

decisions heretofore made considered as mere authorities, we come to the examination of the effect of the judgment of the supreme court of Tennessee pronounced in a suit wherein the present complainant and appellant, The Union and Planters' Bank and The City of Memphis, the present defendant and appellee, were adversary parties; and in which it was adjudged and determined, that the charter tax of one-half of one per cent. was in lieu of all other taxes against the capital stock of said bank as well as against the stockholders upon their shares of stock, and that the capital stock of said bank was not liable to the assessment which had been made, nor for the license or privilege tax asserted against it.

That the suit in which said judgment was rendered was in the name of the State for the use of the city of Memphis, is of no moment.

The city was the real party and is as much concluded as if the suit had been prosecuted directly by it (New Orleans *vs.* Citizens' Bank, 161 U. S., 371, 388; Scotland County *vs.* Hill, 112 U. S., 183).

We come then to the question of the efficacy of the judgment in the prior case as adjudging conclusively that an exemption exists which extends to the capital stock of the complainant bank. The city taxes involved in the prior case were those assessed upon complainant's capital stock by the city of Memphis for the years 1888 to 1891, inclusive.

The taxes involved in the present case are taxes assessed by the same municipality and upon the same capital stock for the year 1899.

The cause of action in the two cases is, therefore, not the same, inasmuch as the demand in the adjudged case was taxes of certain years other than the years involved in this suit.

But the question of exemption of the capital stock from taxation other than that stipulated in the charter was necessarily presented and determined adversely to the claim of

the city of Memphis, upon identically the same facts upon which the right of exemption is now claimed.

Under the decisions of the Supreme Court of the United States, the mere fact that the present demand is for a tax for one year, and the demand in the adjudged case was for taxes for other and antecedent years, "does not prevent the operation of the thing adjudged" (New Orleans *vs.* Citizens' Bank, 167 U. S., 371, 396, 398; Southern Pacific R. R. *vs.* U. S., 168 U. S., 1, 52; New Orleans *vs.* Citizens' Bank).

In New Orleans *vs.* Citizens' Bank, the court said:

"The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has, under identical circumstances and conditions, been previously concluded by a judgment between the parties or their privies."

"This," said the court, "is the elemental rule, stated in the text books and enforced by many decisions of this court."

Among the cases cited as supporting this principle are the cases of Bank *vs.* Beverly, 1 How., 134, 139; Cromwell *vs.* Sac County, 94 U. S., 351, 353, and Last Chance Mining Company *vs.* Tyler Mining Company, 157 U. S., 683, and the case of Heroman *et al.* *vs.* Louisiana, 34 La. An., 805, 814.

This well-settled rule was applied in a case in which the controversy was as to the efficacy of prior judgments upon demands for taxes for years other than those involved in that case, which judgments had been rendered in local courts of the State of Louisiana. In that case it was also contended that public policy forbade the application of the principle stated to controversies as to taxation. After saying that this argument, if meritorious, should be addressed to the law-making and not to the judicial department, Mr. Justice White said, that "it was without real

merit." "In its ultimate aspect it asserts that no question concerning government or public authority ought ever to be submitted to judicial investigation. Indeed, the contention is that there is no power in courts of justice to consider any question of taxation or render any judgment in relation thereto. That this is the result of the proposition is manifest from the fact that the very essence of judicial power is that when a matter is once ascertained and determined it is forever concluded when it arises again under the same circumstances and conditions between parties or their privies. To admit the judicial power on the one hand, and to deny on the other the very substance and essence of such power, is not only contradictory, but destructive of the fundamental conceptions upon which our system of government is based. Under this theory the cause under consideration should not be entertained, but should be dismissed. Accepting the argument in its full consequence, every judgment rendered by this court from the foundation of the Government, declaring a particular tax or burden unconstitutional, imparts no efficacy whatever. Every decree of this court enforcing taxation in order to discharge obligations previously contracted, where the right to the tax was a part of the obligation, is deprived of the sanctity of the thing adjudged, for manifestly if the estoppel of the thing adjudged does not arise from a judgment preventing taxation, such an estoppel cannot also result from a judgment enforcing taxation."

But the defendants say, that whatever the efficacy of such a judgment ordinarily the judgment plead in bar and as a conclusive adjudication of the question of exemption here involved, is a judgment of the supreme court of Tennessee, and that under the well-settled rule of that court a judgment in a tax case is not conclusive between the parties except as to the particular taxes actually in litigation, and is not conclusive in respect of taxes assessed for other and subsequent years when relied upon as *res adjudicata* (State

vs. Bank of Commerce, 95 Tenn., 231; Bank *vs.* Memphis, 101 Tenn., 154, 167).

The opinion of the court in that case was by Judge McAllister, who, upon this subject, said:

"We think the plea of *res adjudicata* in tax cases is to be limited to the taxes actually in litigation, and is not conclusive in respect of taxes assessed for other and subsequent years. Since this is not a Federal question, we decline to follow the ruling in New Orleans *vs.* Citizens' Bank, 167 U. S., 371, in which it was held by a majority opinion that a judgment in a tax case is as conclusive of the taxes of other years as it is of the taxes for the years actually involved.

"In State *vs.* Bank of Commerce, 95 Tenn., 231, we said: 'These suits being for other years than those sued for in the Farrington case, that decision is not (as an adjudication) conclusive of the present case,' citing Cromwell *vs.* County of Sac, 94 U. S., 351; Nesbett *vs.* Riverside Ind. Dist., 144 U. S., 610; W. & W. R. R. *vs.* Alsobrook, 146 U. S., 279; Keokuk R. R. *vs.* Missouri, 152 U. S., 301. We adhere to that ruling."

The effect of the judgment in Bank *vs.* Memphis as *res adjudicata* in avoiding the efficacy of the prior judgment now relied upon as *res adjudicata* is not now before us, inasmuch as that judgment has not been plead or proven, the present hearing being upon a demurrer to the bill of complainant which does not set out the judgment in the case referred to (Turley *vs.* Turley, 85 Tenn., 252, 261; Jourolmon *vs.* Massengill, 86 Tenn., 81; Daniels Eq. Pl., 659, 661; United States *vs.* Bliss, 172 U. S., 321; Bryan *vs.* Campbell, 177 U. S., 649; Freeman on Judgments, sections 283, 332).

The case comes to this: The complainant pleads a judgment as conclusively establishing that a charter exemption exists giving it immunity from the tax here involved, which judgment has no force or effect in the court which rendered it other than as a bar to another suit for the same identical taxes then in litigation, and which, under the law and

usage of that State, "is not conclusive in respect of taxes assessed for other and subsequent years."

The exemption from the ad valorem taxation of its capital stock claimed in this suit exists only, if it exists at all, by reason of the conclusive character of the thing adjudged in the prior case. But if that judgment would not be conclusive in respect to taxes for other years in the courts of the jurisdiction in which it was pronounced, upon what principle does it become of any greater efficacy when relied upon as *res adjudicata* in the courts of another jurisdiction?

By the law of England as it existed when the separation from our mother country occurred, foreign judgments were only *prima facie* evidence upon the merits of the matter in litigation, and when relied upon in the courts of England were subject to re-examination not only as to the jurisdiction of the court, but upon the merits. By the law of this country, a money judgment, rendered by a court of a foreign country having jurisdiction of the parties and the cause, in a suit brought by one of its citizens against one of ours, is only *prima facie* evidence and not conclusive, in an action brought here upon the judgment, when by the law of the foreign country judgments of American courts are not recognized as conclusive (Hilton *vs.* Guyot, 159 U.S., 113).

But such a judgment is conclusive, when sued upon here, as to all matters therein pleaded, and which might have been tried in the foreign court, if it be the judgment of a foreign jurisdiction, which, under like circumstances, regards the judgments of our courts as conclusive (Richie *vs.* McMullen, 159 U. S., 235).

"Before the American Revolution," says Mr. Justice Gray, in the great opinion delivered by him for the court in Hilton *vs.* Guyot, 159 U. S., 113, 181, "all the courts of the several colonies and States were deemed foreign to each other, and, consequently, judgments rendered by any one of them were considered as foreign judgments, and their merits re-examinable in another colony, not only as to the jurisdiction of

the court which pronounced them, but also as to the merits of the controversy, to the extent to which they were understood to be re-examinable in England."

"It was because of that condition of the law, as between the American colonies and States, that the United States at the very beginning of their existence as a nation, ordained that full faith and credit should be given to the judgments of one of the States of the Union in the courts of another of those States."

By section 1 of article 4 of the Constitution of the United States it is accordingly provided that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State; and the Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be, and the effect thereof."

Under this power, the Congress did, at an early day, provide, not only for the mode of authenticating the records and proceedings of the courts of any State, but enacted "that the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usages in the courts of the State from whence the said records are or shall be taken" (Revised Statutes, section 905).

Judgments rendered in one State of the Union, when proved in the courts of another, differ from judgments recovered in a foreign country only in respect to their conclusiveness upon the merits, if rendered by a court having jurisdiction over the parties and the cause of action, and this difference is wholly due to the constitutional and legislative provision already cited (Mills *vs.* Duryea, 7 Cranch, 481, 484, 485; D'Arcey *vs.* Ketchum, 11 How., 165, 175, 176; Hanley *vs.* Donoghue, 116 U. S., 1, 4).

In Wisconsin *vs.* Pelican Ins. Co., 127 U. S., 265, 292, it was said:

"Judgments recovered in one State of the Union, when proved in the courts of another government, whether State or national, within the United States differ from judgments recovered in a foreign country in no other respect than in not being re-examinable on their merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties."

In Hilton *vs.* Guyot, 159 U. S., 113, 189, it was said, that "the decisions of this court have clearly recognized that judgments of a foreign State are *prima facie* evidence only, and that but for these constitutional and legislative provisions, judgments of a State of the Union, when sued upon in another State, would have no greater effect."

The statutory provision, section 905, extends to every court, "within the United States," and, therefore, to courts of the United States, and such courts are, therefore, bound to give to judgments of State courts the same faith and credit which the courts of another State are bound to accord to them (Kansas City, etc., R'd Co. *vs.* Morgan, 21 C. C. A., 468; Pennoyer *vs.* Neff, 95 U. S., 714, 733; Freeman on Judgments, sec. 575).

Neither the constitutional nor legislative provision referred to requires that any such judgment when proven in a court of the United States or of another State shall be given any greater efficacy or degree of conclusiveness than it has by the "law or usage" of the State from which it comes. The plain provision of the statute is, that such judgments "shall have such faith and credit given to them in every court within the United States *as they have by law or usage in the courts of the State from whence the said records are or shall be taken.*"

Nor does any principle of general law or natural justice demand that any greater efficacy shall be accorded to a judgment of any State or foreign country, when either sued upon or plead as *res adjudicata* in the courts of another jurisdiction,

than is accorded to it by the law or usage of the State or country from which the judgment comes.

If such judgment be given the effect and conclusiveness accorded to it at home, every demand of the positive law as well as of justice has been answered.

To give it any greater efficacy than it has in the State or country in which it was rendered would be in opposition to every principle of international law and contrary to principles of moral justice.

Those defenses which might be made to it at home and those only can be made in any other jurisdiction where it is sued upon or plead in bar. These principles find support in the utterances of a multitude of judges, though in none of the cases cited does the precise question here at issue seem to have arisen (Chicago and Alton R. *vs.* Wiggins Ferry Co., 108 U. S., 18, 20; Chase *vs.* Curtis, 113 U. S., 452, 460; Suydam *vs.* Barber, 18 N. Y., 468, 472; Renaud *vs.* Abbott, 116 U. S., 277, 287; Hanley *vs.* Donoghue, 116 U. S., 1; Candee *vs.* Clark, 2 Mich. Rep., 257; Armstrong *vs.* Carson, 2 Dallas, 302; Miles *vs.* Caldwell, 2 Wall., 35; Green *vs.* Sarmiento, 3 Wash. C. C. R., 17; King *vs.* McLean Asylum, etc., 12 C. C. A., 145, 164, 165; Wood *vs.* Watkinson, 17 Conn., 500, 504, 505; Baugh *vs.* Baugh, 4 Bibb. (Ky.), 556; Sweet *vs.* Brockley, 53 Maine, 346; Milan *vs.* Fitz James, 1 Bos. & Pul., 138; Smith *vs.* Nichols, 5 Bing., N. C., 208; Embry *vs.* Palmer, 107 U. S., 3, 10; Poorman *vs.* Crone, Wright's Rep., 347; Freeman on Judgments, section 575; Wells' *Res Adjudicata*, sec. 531; Bates Federal Eq. Practice, section 424).

In Chicago and Alton Railroad Co. *vs.* Wiggins Ferry Co., cited above, speaking of the effect to be attached to the judgment of the State of Missouri, construing a law of another State, the court said:

"So long as the judgment stands, it cannot be impeached collaterally in the courts of the United States any more than in those of the State, by showing that if due effect had been given to the laws it would have been the other way. If it

has the effect of an estoppel, as is claimed, it will continue to have that effect until reversed or set aside in some appropriate form of proceeding instituted directly for that purpose. The courts of the United States must give it the same effect as a judgment that it has in the courts of the State. Whether, as a judgment, it operates as an estoppel, does not depend on the Constitution or laws of the United States, but on the effct of a judgment under the laws of Missouri."

In Suydam *vs.* Barber, 18 N. Y., 468, 472, the suit was against the members of a firm upon a partnership obligation. One of the partners defended upon the ground that the plaintiffs had brought an action against another of the partners alone, in a court of Missouri, and recovered judgment. This Msssouri judgment was plead as operating as an extinguishment of the liability of the other partners.

According to the common law, which prevailed in New York, a judgment against one of several joint debtors, obtained in an action against him alone, was a bar to an action against the others. But it was shown that all contracts which by the common law were joint only, were by the law of Missouri joint and several, and that the effect of a judgment against one thus jointly and severally liable was not to extinguish the obligation or discharge the liability of others.

The New York court held the judgment inoperative as a bar, and, among other things, said :

"The consequences of a judgment, in respect to its effect as a merger or extinguishment of the original demand, are a part of the law under which the judgment itself is rendered, just as much as are those other common consequences of judgments, that a party may have execution upon them and that they are not re-examinable on the merits of the controversy determined by them.

"In all these particulars, the effect of a judgment, in the government where it is rendered, is the subject of positive regulation by that government, just as it is the subject of positive regulation by what process and what courts judgments shall be rendered at all."

Referring to the effect of judgments of one State when plead in another under the constitutional and legislative provisions in respect to the faith and credit to be given to such judgments by the courts of the United States and of other States, the court said:

"While the rule just stated as to the effect of judgments of one State in the courts of another is clear, as is established by the cases cited by Judge Cowen, and by numerous others, yet no case can be found where a greater effect is given to the judgment of any State in the courts of another than belongs to it in the State where it was rendered. Indeed, such a rule would be against all reason, and not only out of the policy of the provisions of the Constitution and laws of the United States on that subject, but against and irreconcilable with all policy and with the plainest and fundamental principles of justice."

Finding that under the law of Missouri the effect of the judgment was not to extinguish the obligation sued upon or discharge the other persons liable, it was held, that no greater effect should be given to such a judgment when relied upon as a bar to a suit against the other parties liable upon the original contract.

In Wood *vs.* Watkinson, cited above, the Connecticut court said:

"Taking it for granted, that when a judgment in the court of a sovereign State, or one of the States of this Union, is sought to be enforced in another State than that in which it was rendered, there is no objection to its validity on the ground of a want of jurisdiction in that court, it is well settled that no greater effect is to be given to it than it would have in the State where it was rendered. It has no higher dignity in any other State than in the one where it was pronounced; and hence, if in the courts of the State where the judgment was rendered, it is inconclusive, or if it is inquirable into there, during a particular period, or on certain conditions, it will be open to investigation, to the same extent, everywhere else (Armstrong *vs.* Carson's Ex'rs, 2 Dall., 302; Green *vs.* Sarmiento, 1 Pet. C. C. Rep.,

74; Spencer *vs.* Sloo, 8 Lou. R., 290; Curtis *vs.* Gibbs, 1 Pennington's R., 399; Baugh *vs.* Baugh, 4 Bibb, 556; Rogers *vs.* Coleman & *ux.*, 1 Hardin's R., 413, 420; Smith *vs.* Nicolls, 5 Bing. N. C., 208; 35 E. C. L., 88).

"So, if a judgment operates in the State where it was rendered only *in rem*, it will not elsewhere be enforced *in personam*. It results conclusively from this principle, or is rather involved in it, that if a judgment in a State where it is recovered, has not the effect of binding personally the defendants, or any of them, in the suit in which it was rendered, no greater effect will be given to it in any other State where it is endeavored to be enforced. It derives its obligation only from the laws of the State in which it is pronounced. A judgment creates a debt, on the ground that a liability is ascertained and established, by the decision of a tribunal, which might rightfully adjudicate upon it; and such adjudication derives its whole force and effect from the laws of the State under whose authority it is made." * * *

That court added:

"There is nothing in our national Constitution on this subject, which, according to any construction which has ever been claimed for it, gives the judgment of one of the States, when sought to be enforced in another, a greater effect than it would have in the State where it was rendered."

There is nothing which precludes this court from determining for itself whether the charter exemption claimed exists to the extent of granting to the appellant immunity from the ad valorem taxes assessed against its capital stock by the defendant, The City of Memphis, except the supposed conclusive effect of the thing adjudged in the prior case which is relied upon as settling the question without looking into the terms of the contractual exemption.

Finding, as we do, that the judgment in the prior case is not, under the law of Tennessee, conclusive when the second suit is a demand for taxes of other years, subsequently assessed, and that in the courts of that State neither party could plead that judgment as a bar to a suit for taxes for other years, we are, therefore, not precluded from looking

into the charter. The opinion of the Supreme Court of the United States in the two cases of Bank of Commerce *vs.* Tennessee, 161 U. S., 134, and Shelby County *vs.* Union and Planters' Bank, 161 U. S., 149, are binding authorities upon us and require that we shall hold that the capital stock of the appellant bank is not exempt from ad valorem taxation by reason of the charter exemption claimed by the Union and Planters' bank.

The demurrers which raise the question we have discussed were properly sustained and the decree dismissing the bill is accordingly affirmed.

JOHN H. WATKINS,
For City of Memphis.

Luke E. Wright.

Supreme Court of the United States.

Nos. 67 and 221.—October Term, 1902.

The Union and Planters' Bank of Memphis, Appellant, 67 *vs.* The City of Memphis and John H. Alsup, Trustee.	Appeal from the Circuit Court of the United States for the Western District of Tennessee.
The Union and Planters' Bank of Memphis, Appellant, 221 *vs.* The City of Memphis.	Appeal from the United States Circuit Court of Appeals for the Sixth Circuit.

[April 13, 1903.]

The Union and Planters' Bank of Memphis was incorporated under a charter granted by the General Assembly of the State of Tennessee in 1858, which contained the following provision: "That said company shall pay an annual tax of one-half of one per cent on each share of stock subscribed, which shall be in lieu of all other taxes." The corporation was located in the city of Memphis, Shelby County, Tennessee, and that city, pursuant to an act of the legislature of Tennessee, assessed an *ad valorem* tax for the year 1899, for municipal purposes, on the capital stock of the bank. The bank, thereupon, filed its bill in the Circuit Court of the United States for the Western Division of the Western District of Tennessee, in which it was alleged that the law under which the assessment was made impaired the obligation of the contract created by the above-quoted clause of the charter. The bill further averred that in a former litigation between the bank and the city, wherein it was sought to enforce a municipal assessment of taxes on the capital stock of the bank for the years 1888, 1889 and 1890, it was adjudged by the Supreme Court of Tennessee that by the provision aforesaid the capital stock of the corporation was exempt from all general taxation. The record and judgment in that suit were set out in full, and pleaded as a final judicial determination of the bank's exemption from the payment of *ad valorem* taxes on its capital stock; and it was averred that the judgment so pleaded was based on the identical claim of exemption now asserted, and on identically the same facts and conditions under which this assessment was made.

The prayer was that the assessment be cancelled and complainant be declared to be exempt from the payment to the city of *ad valorem* taxes on its capital stock.

Defendants demurred, and the demurrer was sustained and the bill dismissed, November 6, 1900, whereupon complainant prayed and perfected an appeal to, and also took a writ of error from, the United States Circuit Court of Appeals for the Sixth Circuit, and the case was docketed there on or about November 27, 1900.

On February 11, 1901, complainant prayed and was granted an appeal from the decree of the Circuit Court directly to this court, the record was filed here, March 23, 1901, and the case is now No. 57.

The case in the Circuit Court of Appeals was heard June 10, 1901, and the decree below was affirmed October 21, 1901. 111 Fed. Rep. 561. Thereupon complainant, appellant in that court, prosecuted an appeal from its decree to this court, and the case was docketed here January 13, 1902, and is now No. 221.

Both cases were submitted, as one case, on printed briefs.

Mr. Chief Justice FULLER delivered the opinion of the Court:

Diversity of citizenship did not exist, and the jurisdiction of the Circuit Court rested solely on the ground that the cause of action arose under the Constitution of the United States. The appeal lay directly to this court under section five of the Judiciary Act of March 3, 1891, and not to the Circuit Court of Appeals. *American Sugar Refining Company* v. *New Orleans*, 181 U. S. 277. Nevertheless an appeal having been prosecuted to the latter court and having there gone to decree, an appeal was allowed to this court because the judgment was not made final in that court by section six of the act. But the case being here, and the jurisdiction of the Circuit Court having depended on the sole ground that it arose under the Constitution, we are constrained to reverse the decree of the Circuit Court of Appeals, not on the merits, but by reason of the want of jurisdiction in that court. If this were not so, the right to two appeals would exist in every similar case notwithstanding, as we have repeatedly held, that such was not the intention of the act. *Robinson* v. *Caldwell*, 165 U. S. 359; *Loeb* v. *Trustees*, 179 U. S. 472; *American Sugar Refining Co.* v. *New Orleans*, *supra*.

In *Pullman's Palace Car Company* v. *Central Transportation Company*, 171 U. S. 138, an appeal was taken to this court and also to the Circuit Court of Appeals, and a motion was made in each court to dismiss the appeal, whereupon, by reason of the circumstances, we granted a writ of certiorari and brought up the record from the latter court before it had proceeded to decree. The question as to which was the correct route to reach this court became immaterial, and we disposed of the case on its merits. But in the present case the Circuit Court of Appeals went to decree, and

we are obliged to deal with the appeal therefrom, in doing which the jurisdiction of that court necessarily comes under review.

The questions on the merits are, however, presented for disposition on the direct appeal from the Circuit Court.

In *Shelby County* v. *Union and Planters' Bank*, 161 U. S. 149, (1895,) it was decided that the capital stock of the bank was not exempt from *ad valorem* taxation by the provision of the charter in question and was liable to be taxed as the State might determine. *Bank of Commerce* v. *Tennessee*, 161 U. S. 134.

But the bank objects that notwithstanding this court has thus held that the exemption asserted does not exist, it must nevertheless be recognized, in this case, as existing, because it was so determined by the judgment pleaded as *res judicata*. The judgment thus relied on as a bar to this assessment is reported in *Memphis* v. *Union and Planters' Bank*, 91 Tenn. 546, (1892), which involved the assessment of municipal taxes, for the years 1887 to 1891 inclusive, on the capital stock of the bank, and a privilege tax for the years 1889, 1890 and 1891. The Supreme Court of Tennessee there held in deference to the supposed scope of the decisions of this court in *Farrington* v. *Tennessee*, 95 U. S. 679, (1877,) and in *Bank* v. *Tennessee*, 104 U. S. 493, (1881), that the bank was exempted by the charter from being assessed by the State, county, or municipality, for any taxes except as specified.

In *Bank* v. *Memphis*, 101 Tenn. 154, (1898,) the conclusion announced in *Shelby County* v. *Bank*, 161 U. S. 149, was followed, and it was held to be the settled rule in Tennessee that the plea of *res judicata* is only applicable to the taxes actually in litigation, and is not conclusive in respect to taxes assessed for other and subsequent years. *State* v. *Bank*, 95 Tenn. 231.

As the judgment relied on as *res judicata* was not so regarded in *Shelby County* v. *Bank*, it could not be properly so regarded in the present case; but, apart from that, it is enough that in Tennessee the doctrine of *res judicata* is not applicable to taxes for years other than those under consideration in the particular case, inasmuch as what effect a judgment of a State court shall have as *res judicata* is a question of State or local law, and the taxes involved in this suit are taxes for years other than those involved in the prior adjudication. *Phoenix Fire and Marine Insurance Company* v. *Tennessee*, 161 U. S. 174.

In *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, referred to by appellant's counsel, no claim was made that the judgment relied on would not have been *res judicata* in the State courts, and attention was particularly called to the fact that the rule in Louisiana was in accord with the conception of *res judicata* expounded in that case.

As the judgment pleaded had no force or effect in the Tennessee State courts other than as a bar to the identical taxes litigated in the suit,

the courts of the United States can accord it no greater efficacy. *Cooper* v. *Newell*, 173 U. S. 555; *Metcalf* v. *Watertown*, 153 U. S. 671; *Chicago & Alton R. R. Co.* v. *Wiggins Ferry Co.*, 108 U. S. 118; Rev. Stat. § 905.

The litigation over the alleged exemption has been protracted, and many decisions have been rendered in this court and in the highest tribunal of Tennessee in respect of it. They are reviewed by Lurton, J., in the Circuit Court of Appeals, 111 Fed. Rep. 561.

Decree of the Circuit Court in No. 67 *affirmed.*

Decree of the Circuit Court of Appeals in No. 221 *reversed with a direction to dismiss the appeal and writ of error.*

True copy.

Test:

Clerk Supreme Court, U. S.